United States Court of Appeals

for the Second Circuit

APPENDIX

75-7698

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC. and HERBERT FREY and LOIS MUCK, as co-executors of the Estate of GEORGE C. FREY, Deceased,

Plaintiffs-Appellants,

vs.

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the Controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants-Appellees.

APPEAL FROM THE FINAL DECISION, ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK AT CIVIL ACTION NO. 1970-277.

UNITED STATES COURT OF APPEALS
FILED
SEP 13 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX

VOLUME II—Pages 705-1372

RAICHLE, BANNING, WEISS & HALPERN,
Attorneys for Plaintiffs-Appellants,
10 Lafayette Square,
Buffalo, New York 14203.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR,
Attorneys for Defendants-Appellees,
1800 One M & T Plaza,
Buffalo, New York 14203.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
20 CENTER ST., BATAVIA, N. Y. 14020
716-343-0457

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

- -

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC: and HERBERT FREY AND LOIS MUCK, as Co-Executors of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

-vs- Civil Action No. 1970 -

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, Individually, and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

Defendants.

- -

Examination before trial of HERBERT FREY, held before James E. Crosby, Notary Public, at the Statler Hilton Hotel, Buffalo, New York, on Tuesday, March 6, 1973, commencing at 1:00 o'clock, p.m. pursuant to notice.

APPEARANCES: RAICHLE, BANNING, WEISS & HALPERN
BY: ARNOLD WEISS, ESQ.,
Attorneys for the Plaintiffs.

MANZ, MANZ & DIVIAK
BY: VICTOR E. MANZ, ESQ.,
Attorneys for the Defendants.

H E R B E R T F R E Y, having been previously duly sworn, resumed the stand and testified further as follows:

MR. MANZ: All right. On the record. The first request, this is a recap of requests: all leases of sand and gravel lands in Genesee County.

MR. WEISS: That is all sand, gravel and aggregate.

MR. MANZ: Right.

MR. WEISS: Lands in Genesee County.

MR. MANZ: In Genesee County or any other County. I might as well expand that to that, if there are any.

MR. WEISS: Well, we will take out "county" and No. 1 will read, "All leases of sand, gravel and aggregate lands".

MR. MANZ: Right.

MR. WEISS: I might say that you fellows could start working on the same thing because we will be asking you for -- reciprocally for the same thing. You might get started getting them ready because they

* * *

quest at this time the list of the wages paid to the mechanics in the last two years. You have the same thing. We will give you whatever you want in that respect.

MR. WEISS: Fine.

THE WITNESS: Mechanics wages?

MR. WEISS: Mechanics wages paid since -- what year was that, 1971, 1972 and 1973?

THE WITNESS: That would be 1973 now.

MR. MANZ: 1972 --

MR. WEISS: During -- well, we will make it from 1971 to date; is that okay?

MR. MANZ: Fine. Anything else?

MR. WEISS: No.

MR. MANZ: All right.

EXAMINATION BY MR. MANZ:

Q. Now, Mr. Frey, from the time that Pine Hill refused to deliver material to you, to your bins in Lancaster, until the time the deliveries were resumed, where did you obtain your material for the Lancaster Plant?

MR. WEISS: Do you want a list of this or --

THE WITNESS: I will have to stop and think.

MR. MANZ: Just a point of information.

THE WITNESS: We got some from Frey Sand & Gravel. I think we got most of it from Dan Gernatt.

BY MR. MANZ:

Q. Okay.

A. And some from Machias. I believe it was Machias. We got some from them too.

Q. Did you keep a separate list of where the purchases were made?

A. Not directly but, I mean, our records would indicate that by, probably from trucking we may be able to tell you.

Q. Did you make a separate list in preparation for this lawsuit that you are involved in?

A. No, not yet.

MR. MANZ: Okay. Mr. Weiss, I think in view of the fact that this is one of the important factors in your lawsuit, I think we would like a separate concise resume of the materials and the sources for

* * *

though, will need to get more records from Pine Hill before we can give them to you.

MR. MANZ: All right. Let it stand as is.

MR. WEISS: In the meantime, however, we are prepared to give you whatever Mr. Frey has on the itemizations and particulars of the bills he sent you. I do feel that we will have to have our full inspection of Pine Hill's records before we can give you a complete damage computation.

MR. MANZ: I don't agree with that, but let it stand on the record.

BY MR. MANZ:

Q. Now, Mr. Frey, I think I might have touched on this yesterday, but as a matter of interest and as a matter of evidence, can you tell me why only 25% of the material that you use and have used in either one of your plants comes from your holdings and your processing in Genesee County?

A. I think basically the reason is because we are able to buy from other sources even cheaper than

we can buy from ourselves. If we have a surplus of materials that isn't maybe moving at Alexander, then we will usually draw from our own, just to balance it out or try to keep it -- use up the surplus, in other words.

Q. Do you have any figures in mind that indicate how much the average cost of these materials that you purchased from other sources such as Franklinville, Machias and Dan Gernatt are to the costs that were involved when you purchased from Pine Hill?

MR. WEISS: You are asking for an offhand opinion on this?

MR. MANZ: Well, he is the expert. He is the President. He must know, and I want to know what he knows right now.

MR. WEISS: All right.

THE WITNESS: I am afraid I am missing your point. Try it again.

BY MR. MANZ:

Q. In other words, when you buy from Pine Hill, it cost you x number of dollars?

A. Yes.

* * *

A. We have.
Q. Okay. Is Bender in business?
A. Very much so.
Q. Does he still buy from you, Genesee County?
A. No, sir. My father and him got in loggerheads.
Q. Where did that occur? When did they have a dispute or argument?
A. They had it right over the telephone. It was quite sometime ago. He told him what he thought of my pa and my pa told him what he thought of Bender and that was the end of it right there.
Q. All right. Are there any other companies that used to purchase from you?
A. In the ready-mix business?
Q. Yes.
A. Not that I can recollect offhand.
Q. Can you think of any other companies that your father had arguments with, or they argued with your father and stopped buying from you?
A. No, not at all.
Q. All right. Mr. Frey, from your own knowledge, who is the biggest producer and seller of ready-mix concrete in this County of Erie?

A. Pine Hill.
Q. Who is second?
A. I think we would be.
Q. Who is third?
A. If you are taking it from this day, right today, I would say it is Clarence.
Q. Okay. Who is fourth, sir?
A. Probably Buffalo Gravel would fit in there. If we are talking about Union Operators now --
Q. Yes.
A. If we are talking about Non-Union, that is something else.
Q. We will take it one at a time. How about -- has everyone that you have given us to this moment been Union?
A. Yes.
Q. Who else; who follows in line after that?
A. I would say if it had to fit in there, I would say Bender fits in between Buffalo Gravel and

MRS. MUCK: He is Non-Union.

THE WITNESS: I said that. Bender would fit in. I am guessing between Buffalo Gravel and Clarence.

MR. WEISS: That is Non-Union; right?

THE WITNESS: Yes.

BY MR. MANZ:

Q. Then you mentioned the Union and Non-Union; is that correct?

A. Yes. That is, if you are going to combine them.

Q. All right. Do you have any knowledge of what percentage of the general ready-mix field that you have in sales is?

MR. WEISS: When?

MR. MANZ: Presently?

THE WITNESS: No.

MR. WEISS: I tell you, it would be helpful if -- it seems to me, rather than guessing at it, we know your sales and you know our sales; we will both know. How can he tell without knowing your sales? He has told you that you are the highest. Maybe he is wrong. Maybe you are not the highest.

MR. MANZ: Mr. Weiss --

MR. WEISS: Okay.

MR. MANZ: This is an examination before trial --

MR. WEISS: I am trying to be helpful to you.

MR. MANZ: Well, when I need your help, I will ask you.

MR. WEISS: You promise?

MR. MANZ: And every time that we reach some crucial point, you always inject yourself. You always testify and interrupt your own client.

MR. WEISS: Now look, Vic --

MR. MANZ: Let's do this right. Why don't you object to the thing if you don't like the question? I would like direct answers from your client.

MR. WEISS: You are right about one thing. This is an extremely crucial part of the lawsuit. It is very important and it is important that we have accurate figures. Now, his guessing as to who is bigger and how much bigger is immaterial. The important thing is, as a matter of fact, who is actually the biggest. I agree with you that this is a crucial item and I want it to be accurate.

MR. MANZ: Let your client answer the questions, please. If he doesn't know, he doesn't know. I am asking him for his best recollection.

MR. WEISS: You want to know as of today?

MR. MANZ: Yes. I will ask the question again.

BY MR. MANZ:

Q. Mr. Frey, what is your best estimate of what percentage of the sales of the ready-mix business does your company have as it pertains to the whole?

A. I couldn't answer that.

Q. Do you have any information at all, personal information, as to these facts?

A. No, sir, and I have no way of getting it.

Q. You have no printed or documented evidence either?

A. I wouldn't know, and I don't know anybody else that would have it either.

Q. As a matter of interest, you changed the name from George C. Frey Ready-Mixed Concrete, Inc. on what date?

A. Can you help me on that, sir?

MRS. MUCK: January 1, 1972.

* * *

MR. MANZ: Off the record.

(DISCUSSION OFF THE RECORD).

THE WITNESS: Okay. 1968, 1969 and 1970, I guess, is my guesstimate.

BY MR. MANZ:

Q. Okay. Did you make a profit in 1971?

A. I think maybe we balanced the books then.

MRS. MUCK: Yes, we did.

MR. MANZ: I am sorry. What did you say, Mrs. Muck? You did make a profit?

MRS. MUCK: Yes, in 1971.

BY MR. MANZ:

Q. Okay. Now, could you tell me again when you started to make and become involved in competitive bids on behalf of the Ready-Mix Company; what year?

A. As I told you, Mr. Manz, before, I couldn't tell you what date that really started. I just couldn't tell you.

Q. Okay. That is roughly what year?

A. I wouldn't even attempt.

Q. All right. More than ten years ago?

MR. WEISS: I will object to the question. He said

he couldn't even attempt to tell you.

THE WITNESS: Your guess is as good as mine.

BY MR. MANZ:

Q. All right. Now, could you tell me from your own experience, what the difference is between the company entering the bidding and the contractual field versus not being involved in that field?

A. Would you please rephrase the question? I am missing your point.

Q. All right. When you started to bid on jobs was it because of larger jobs, or was this strictly because it is competitive bidding on behalf of some municipality, or instrumentality?

A. I think you really got two questions in there, don't you?

Q. All right. Can you answer that the way I asked it?

A. No, I cannot. I just can't. Try and rephrase it and I will try it.

Q. Under what circumstances did you get involved in bidding on contracts; your company?

A. Today?

Q. At any time when you started to the present time?

MR. WEISS: Could you rephrase that and make it a little clearer? I think maybe there is an easier --

BY MR. MANZ:

Q. You are involved in bidding now; is that right?

A. Yes.

Q. What type of jobs do you bid now?

MR. WEISS: Let him answer the first one.

MR. MANZ: He did, he said, "Yes".

MR. WEISS: Okay.

THE WITNESS: What types of jobs do we bid; anything that comes through the door.

BY MR. MANZ:

Q. All right. Exactly. But are they characterized as specific types of jobs? Do you have to do with State work, or governmental instrumentalities?

A. I think the State, if I am not -- well, let's put it this way: the County asks for a bid. I think the State asks for a bid. That is not the major part of anybody's work in this area.

Q. That is what I am asking you to tell me. What does it entail? What is the major part?

A. I think commercial work has been, in the past year, past few years, has probably been more of what is going on. Housing was bad off, but housing has picked up this past year, we noticed quite a difference.

Q. So in other words, you bid on commercial jobs and you also bid on residential work?

A. Normally, you don't bid. You have a customer usually and he does residential work. You don't run around where a business is building a house and cry and get his concrete. There is not that kind of money in it that you can do that kind of work.

Q. Well, what is it, the land developer and he has subdivisions and do you bid on those jobs, or do you make agreements with that individual to furnish him with all this, his ready-mix needs?

A. I don't think I ever recollect that we ever contacted a land developer. He doesn't pour the concrete in the first place.

MR. WEISS: What is that?

THE WITNESS: He rarely ever pours the concrete in the first place.

BY MR. MANZ:

Q. The question that I am asking you, and I think you answered, "no", is that you, at no time, apparently, deal directly with a subdivider and make agreements with him to furnish his needs as far as the ready-mix business is concerned; is that right?

A. If we have, I don't remember it.

Q. With whom did you deal?

A. Normally we deal with the contractors directly.

Q. Okay. And do you make agreements in writing with them to furnish them with all their needs for a particular Subdivision?

A. You are back on Subdivisions. No, we do not stipulate subdivisions.

Q. All right. Tell me then, in your own words, how do you get involved with contractors and residential work?

A. Oh --

Q. They come to you and ask you to furnish them

with their needs; is that right?

A. Usually.

Q. Do you ever go to them?

A. Or our salesmen visits them, sure.

Q. Okay. And do you have agreements with them in writing?

A. Not usually.

Q. So in other words, some of the contracts are in writing?

A. Usually your larger commercial jobs would be in writing with a general contractor. I am referring to large, usually Union -- more so designated by being Union contractors would be more apt to be what we call "heavy commercial". Maybe I am improperly putting it, but I think that is it.

Q. We understand. Now, in regard to the heavy commercial jobs, are these competitive, or are these private agreements you make?

A. What do you mean, "private"?

Q. Well, first by sealed bids?

A. I don't believe so.

Q. In other words, you make a private agreement with

the contractor and you supply him with all the needs for a particular job at a certain price; is that it?

A. Usually if a job comes up, you will find out most generally through the Dodge Bulletin and notices mailed to you. You can, if I am not wrong, I believe sometimes we get -- find out who is going to bid it. The salesmen do that, and then they go and try and find out what specifications are going to be required on the job; the bag content, that is what it really sifts down to, and any specialty items on it, and then they usually quote it.

Q. Okay.

A. And usually you have to write to him in letter form and that is about the grand extent of the bid.

Q. All right. And in the majority of the jobs, do your other competitors do the same thing?

A. I believe that is so.

Q. And have you been successful a part of the time in selling these jobs?

A. Once in a while; yes.

Q. Let's say in the last two years, from your own knowledge, have you sold some jobs in direct competition with Pine Hill?

A. Yes.

Q. Could you tell us the names of these jobs?

A. No, I am not qualified, really.

Q. All right. What are some of the big jobs that you are working on now, at the present time?

MR. WEISS: I will object to that and instruct him not to answer. You mean preparing bids on, or fulfilling?

MR. MANZ: Fulfilling.

MR. WEISS: I will not object to what he is fulfilling now, but I will instruct him not to answer with respect to any jobs that you are currently preparing bids on.

BY MR. MANZ:

Q. These are present jobs that you are supplying materials to, or ready-mix?

A. Well, we have some work down on the State University of Buffalo.

Q. Was this done with the submission in letter form

of your quotes for the job?

A. Initially that is what you do; yes.

Q. All right. Do you have a copy of these letters that you submitted?

A. What we submitted on these bids?

Q. On each job?

A. I imagine our salesmen do.

Q. All right. Okay. We have that job. What other jobs are you presently fulfilling?

A. Another one that we have now is the -- we call it the Southtown Community Campus. That may be the right term -- does that sound right?

Q. Is that an Erie County Government job?

A. Yes, that is -- I think it is County funded; yes.

Q. Okay. Any other jobs?

A. I believe we have the Meyer Memorial Hospital.

Q. Could you give me the whole list?

A. Well, I can't.

Q. You can write them down if you want to on your sheet of paper that you have there. I mean, if that makes it easier for you, and then you can also write down the jobs that you completed in 1972 and 1971?

A. May we go off the record for a moment?

MR. MANZ: Off the record.

(DISCUSSION OFF THE RECORD).

MR. MANZ: All right. Back on the record.

BY MR. MANZ:

Q. Mr. Frey, we have been off the record and during that time you have been compiling a list, the names of jobs that your company was involved with in the year 1971 and 1972. Now, other than the names that you previously gave us, could you give us the names of the other jobs?

A. Well, that is Meyer Memorial Hospital, Southtown Campus and U. B. State Complex. There are a number of jobs in there and I can't tell you which is which, and I won't even profess to. Now, you asked for some jobs that we have recently completed: the Buffalo Evening News, the parking ramp over here, I believe it is next to done if it isn't done, and there was a Rosa Coplon Home, but I am not sure whether that is done or not done. Those are some that I can think of. There are more, but I am just not up to giving it to you.

* * *

MR. MANZ: Yes.

THE WITNESS: No. I don't think we had any gravy-train jobs.

BY MR. MANZ:

Q. Did you make money on those jobs that you listed?

A. On the Buffalo Evening News job we did. The parking ramp, we probably did. On the Rosa Coplon Home job, I couldn't tell you.

MR. WEISS: Again, thes figures are available.

THE WITNESS: I have no way of actually computing this. You asked me to guess and that is what I am doing for you.

MR. WEISS: You have asked us for the financial statements which will indicate this. Again, I assume you want to have some preliminary information?

MR. MANZ: Yes.

BY MR. MANZ:

Q. Do you know from your own knowledge of any jobs that you had bid on that Pine Hill was the successful bidder for the 1972 and 1971?

A. If you left 1971 out, I could maybe answer something, but 1972 is about the only one, the only

one I can think of, and I don't know why we are on that, and that would be the Stadium. That is the 1972 job, I am guessing, was let in --

Q. That is the new Erie County Stadium?

A. Yes. We are hauling some concrete in there, and I know very well it should have been Pine Hill's work.

Q. All right. So in other words, you have got the Stadium job. You didn't mention that job before, did you?

A. No, I didn't mention it, because we don't have the job.

Q. You don't have the job?

A. We are hauling some concrete there; that is all I can tell you.

Q. For whom are you hauling the concrete?

A. Cowper, supposedly gave that job. Cowper, as was reported and I can't remember where I found that out and Pine Hill was supposed to be the principal supplier and there was supposed to be an auxiliary supplier; Reliable in East Aurora.

Q. Mr. Frey, the question I asked you is really

what jobs that you bid on that were also bid on by Pine Hill that Pine Hill was successful in?

MR.WEISS: That he knows of?

MR. MANZ: Yes.

THE WITNESS: I don't know, sir.

BY MR. MANZ:

Q. All right. What jobs did you bid on, from your own knowledge, that Pine Hill did in the year 1972?

A. Bid on?

Q. Yes.

A. I would have to guess --

MR. WEISS: we don't want that, Mr. Frey.

THE WITNESS: Well, it is best then that I don't answer because I don't know whether they bid or did not bid.

BY MR. MANZ:

Q. Mr. Frey, it is easy to say that you don't know, but you do know that your competitor, one of your competitors, Pine Hill, had worked certain jobs in the year 1972. This is common knowledge, and you know that they had certain jobs that you

didn't have; isn't that correct?

A. Yes.

Q. Okay. Now, what jobs do you know of that they had in 1972 that you did not have?

A. I really don't know. I don't know.

Q. Not even one?

A. 1972, I am referring to the Stadium, that is one that I know they are doing.

Q. So that is one there.

A. Wait a minute, there was one more. I think they have the Meyer job.

Q. You bid on that and they --

A. It was Phase II. I believe that they have Phase II.

Q. All right. Any others? Well, do you know in the year 1972 of certain jobs that you bid on that you were not successful on?

MRS. MUCK: We had the first Phase of Millard Fillmore and the second Phase of Millard Fillmore, he had. I know he said the wrong words.

MR. WEISS: If she can help, I am all for it.

THE WITNESS: Then you have the one, the second phase

of Meyer. That must be Millard Fillmore according to my sister, and we must have had the first phase then on the Millard Fillmore.

Pine Hill must have had the second phase.

BY MR. MANZ:

Q. All right.

A. Am I answering your question?

Q. Very well, yes. You are doing very well. Now, let's progress.

A. Something has to be the matter then, if I am doing good.

Q. No, you have a good memory. Can you tell me any of the jobs in 1972 that you bid on that you were not the successful bidder?

A. I can't recollect right now.

Q. How about 1971?

A. I couldn't.

Q. 1970?

A. I can't.

Q. Do you have a list of all the jobs that you bid on that you were not successful on?

* * *

Q. You haven't. Do you have any gimmicks down in a book?

A. No, but you will sure have them down on your statements if they billed them out.

Q. So you would have the gimmicks elaborated and indicated on any of these statements?

A. Oh, yes.

MR. WEISS: I trust the same is true with Pine Hill.

MR. MANZ: I don't think so.

MR. WEISS: But you would have it on a statement?

MR. MANZ: I can't think of any gimmicks.

MR. WEISS: All right.

BY MR. MANZ:

Q. Has there been any one year that you know of, since you have been in business, or your father, where Pine Hill has taken away all of the bids or contracts that you have been interested in?

MR. WEISS: Now, wait a minute. Are you saying every single one of them?

MR. MANZ: Yes. I am starting there and will develop it. Don't tell me how to ask the questions.

MR. WEISS: No I didn't want to. I just wanted

to make it clear that you are saying every one of them.

MR. MANZ: That is right. That is what I said.

MR. WEISS: In that year?

MR. MANZ: Every one.

MR. WEISS: Every one.

THE WITNESS: No, sir.

BY MR. MANZ:

Q. Okay. Has there been any year where they have taken away, say, 75% ?

MR. WEISS: How could you tell that; percent of what?

MR. MANZ: Let him answer.

MR. WEISS: 75% of what?

MR. MANZ: Let him answer.

MR. WEISS: Make that clear.

MR. MANZ: Now, here we go again.

MR. WEISS: I will object to the form of the question.

MR. MANZ: You are going to start testifying again and telling him what to say, like you have been doing right along.

MR. WEISS: I object to the form of the question.

BY MR. MANZ:

Q. Okay. Do you understand the question, Mr. Frey?

A. Yes.

Q. All right. Has there been any one year that you know of where they have taken away, say, 75% of the jobs that you have bid on?

A. I truthfully couldn't answer that, but I don't suspect there has been.

Q. How about 50%?

A. I don't know.

Q. How about 25%?

A. I don't know, sir.

Q. How do you feel at the present time, from your knowledge and your experience, what is the ratio between the jobs that you bid on, that you are successful on, and the ones that Pine Hill takes away from you in competition?

MR. WEISS: I must ask you for clarification. Are you talking about jobs --

MR. MANZ: Presently.

MR. WEISS: Specific jobs or tonnage, or dollar volume; you know, there could be a lot of little jobs. You mean job size?

MR. MANZ: In toto.

MR. WEISS: Toto what?

* * *

Let's be more specific.

Q. All right.

A. We usually took that from our West Seneca Plant. That was a plant that has been first automated and also has been automated -- I think we have run some currently from our Lancaster Plant, automated, and we have used Dan Gernatt's material or our own.

Q. All right. But over the years, you will admit that you did purchase material from Pine Hill, that Pine Hill furnished to your bins in the Lancaster Plant that were used for State jobs, but you didn't pay any extra for the material?

A. I kind of would clarify that; not State accepted material. It didn't call for State accepted material. The State funded the jobs, but maybe they didn't specify State accepted material.

To help you out there, whenever you do any State work, you have an inspector in that plant, I guess so you won't goof it up very much.

Q. All right. Are you saying then that you never used any of Pine Hill's material for State accepted jobs, or state accepted material that

you purchased from Pine Hill?

A. Not that I know of.

Q. Do you keep a separate record of all the State accepted jobs?

A. No.

Q. Over the years?

A. No. Our business with the State of New York is pretty nil. We don't concentrate on road work at all.

Q. All right. Now, on these jobs that you mentioned, that you were successful on, were there other people bidding on the contracts other than Pine Hill and George G. Frey?

A. I would guess so, and this is strictly a guess. I would --

MR. WEISS: Mr. Frey, you can't guess. If you know, then say so. If you don't know --

THE WITNESS: No, I don't know. I would have to assume, yes.

BY MR. MANZ:

Q. I mean, I am sure that you have been told by your salesmen that there are other people bidding on these jobs; is that right?

A. I could have been told at the time, but it doesn't stick. There are other competitors in the area and they are good competitors: Clarence, and there is Gravel Products, or Buffalo Gravel. For your own records, Buffalo Gravel laid pretty dormant here for the past -- I think the year 1972; they done stuff, but not much. Prior to that, they were right in there kicking and they seem to be right back at it again.

Q. Okay. Do you know where Buffalo Gravel gets its gravel?

A. Lake Sand, usually. They usually use slag and they use their own crushed stone and it is fundamentally what they try to sell, basically, if they can. Anything else, they consider a specialty item and they try to stay away from it, gravels, for some reason or other.

Q. How about Clarence?

A. They, fundamentally, buy gravel.

Q. Do you know from whom?

A. Basically, I believe DeWitt.

Q. And does Clarence Sand & Gravel bid on any City

jobs or County jobs?

A. I think they will bid them where it doesn't require automation and they have gotten away from some cases even where they do require automation, they did get away with it.

Q. Do you know from your own knowledge in the past year, say, 1972 of jobs that Clarence Sand & Gravel bid on and they were successful on the same -- against jobs that you bid on?

A. One outstanding job would be this job down -- it is the housing project and it is down in there where it used to be, between Hertle and -- off of Hertele Avenue, down by the River.

Q. Watergate?

A. What the dickens in the name of that job; it is quite a large housing project?

Q. That is the one that Ciminelli -- Frank Ciminelli's job?

A. Yes, that is the most outstanding one that I can point to now.

Q. And did you say, sir, that you bid on that job also?

A. Yes. I believe we did.

Q. That is the Watergate Development, redevelopment?
A. Yes, I guess that is correct. Don't hold me to that, I am not sure of the name.
Q. All right. Can you think of any other jobs, in, say, 1971 or 1972?
MR. WEISS: That what?
THE WITNESS: Clarence is involved in.
MR. MANZ: Yes, that they bid on; that Frey bid on also.
THE WITNESS: No. There have been some, but I just --
BY MR. MANZ:
Q. How about Buffalo Gravel?
A. You mean that we bid and Buffalo Gravel bid?
Q. Yes.
A. There have been jobs. I couldn't tell you. I can assure you of that.
Q. You consider them a good competitor also; Buffalo Gravel?
A. I suppose,my notions from time to time -- I wouldn't answer that either way.
Q. But they do compete with you and sometimes they win and sometimes you win?
A. They compete with all of us.

Q. And does the same apply to Clarence?
A. Pardon?
Q. The same statement that you made now, does that apply to Clarence also?
A. You mean --
Q. Competing with you and being successful?
A. They compete and they are successful.
Q. In fact, all other ready-mix companies in the area they are the ones that you enumerated previously, they bid and win some and they lose some; is that right?
A. I believe that is right.
Q. Now, do the ready-mix companies have an association that they use to negotiate contracts with various Labor Unions?
A. Yes.
Q. What is the name of it?
A. We have the Dump Truck -- I think that is the right name. The Western New York Dump Truck Association.
Q. Yes.
A. And the Ready-Mix -- I think we participate by merely paying dues in that. There is the Ready-

* * *

THE WITNESS: I would like to go off the record. I can go deeply into this. It can be condensed. Can we go off the record?

MR. MANZ: Well, the only thing, Mr. Frey, really this is important and I think it should be on the record.

THE WITNESS: All right.

BY MR. MANZ:

Q. Just explain it as best you can.

A. All right. I can't tell you the year that we negotiated the one contract, but what I say is, it was a combination of what was going on and what was to move out. It was quite a long, lengthy strike and appparently I was the only hold-out left, and this has been not unusual for me. It is quite popular that when I see things that I don't like, I put my foot down and I did it at this time.

I eventually wound up being the hold-out for the whole industry because I knew what was going on would affect our sand and gravel to the point that it would be literally impossible for us to ever function it.

Q. What year was that?

A. I couldn't tell you now. As I told you at the start, it can be looked up. Anyhow, at that time I asked the Committee before we went back in general acceptance, I had a private conversation with the Engineers. I went and talked to the Engineers and I told them I would like to, at this time, hold the negotiations for the sand and gravel out and I would talk to them at a later date. I didn't want them involved in the settlement.

They agreed to this and then we went back and we settled. I tried to keep Clarence and Pine Hill from going for this settlement.

In condensed words, both of them were hell bent for election, disregarding the costs and throwing to the four winds, and I really felt we had the Engineers where we wanted them, and I think for another day or two, I know we had them where we wanted them. We all could have had a decent contract on the sand and gravel industry.

Condensed down as briefly as I can, I

am cutting out an awful lot of phases out of this to keep it brief, condensed down, we went ahead with the settlement. We accepted the settlement and the only ones that were able to go back to work was Clarence in the sand and gravel business and Pine Hill.

I did not hold them back for the sand and gravel business. Then we were down for a little over a year and a half, that we never moved a muscle. The only thing we did, the Foreman out there, that was Hyman Muck, when it came to the Fall of the year, he loaded out -- no, the Highway Department brought in their own machines and loaded the material out, the sand material. I believe we went a year and a half or two years like that, and we were down and finally the Engineers come and said, "All them boys that used to work for you have now got jobs elsewhere; now, if you want to write up a contract, let's write one up and go back to work".

So that just was what we done.

Q. So since that time, you have always kept the

these contracts and the pay therein at a lower level; is that right?

A. In direct proportion, I believe, to probably the same as the Machias and the Franklinville contracts, more or less about the same type of contract, the people that are in the true aggregate business.

Q. You don't have to pay anything extra, or make any special deal to get this contract with anyone?

A. Oh, no, sir, it was done very legally and above-board. They had to wait until there was no boys left to object and this is what the Union done. That is condensed as brief as I can make it. You got to be willing to set it down.

Q. How many years did you hold out before you signed a contract with the Engineers?

A. Geez, it must have been about -- I am guessing -- I think it was about a little over a year and a half, somewhere in there, a year anyway.

Q. Can you give me a general idea of when this all happened, not to hold you to the exact year?

* * *

JEC:HH:5
3-13-73

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

- -

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC.: and HERBERT FREY and LOIS MUCK, as Co-Executors of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

-vs-

CIVIL ACTION NO. 1970 -

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, Individually, and as controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

Defendants.

- -

Examination before trial of HERBERT FREY, held before James E. Crosby, Notary Public, at the Statler Hilton Hotel, Buffalo, New York, on Tuesday, March 13, 1973, commencing at 10:00 a.m., pursuant to notice.

APPEARANCES: RAICHLE, BANNING, WEISS & HALPERN
BY: ARNOLD WEISS, ESQ.,
Attorneys for the Plaintiffs.

MANZ, MANZ & DIVLAK
BY: VICTOR E. MANZ, ESQ.,
Attorneys for the Defendants.

H E R B E R T F R E Y, having previously been duly sworn, was examined and testified further as follows:

EXAMINATION BY MR. MANZ:

Q. Okay. Let's see, this is the adjourned date of the examination of Mr. Frey. Mr. Frey, you did bring a box of some of the documents that we requested previously with you this morning and you presented them to us; is that right?

A. Right.

Q. Now, this is the second box that has been presented.

MR. WEISS: Yes.

MR. MANZ: Yes. Now, we have made a list of what has not been furnished. I thought possibly we could go over this. Do you want to look at this list and see if it is correct?

MR. WEISS: This is a list made before today?

MR. MANZ: Before today, and only "J", item "J" there is partially complied with.

MR. WEISS: Item "J" was complied with today, I think?

* * *

MR. MANZ: In other words, that is within the realm of your knowledge, Mrs. Muck?

MRS. MUCK: Yes. I think so.

BY MR. MANZ:

Q. All right. Mr. Frey, the Alexander operation was put into effect, I think you stated, sometime in 1959 or 1960; is that correct?

A. I think that is about right, sir.

Q. Okay. Right. And when that operation was put into effect, was it primarily put into effect to service and supply your West Seneca Plant?

A. No, sir.

Q. All right. Now, can you tell me why you developed the operation out in Alexander?

A. Well, no particular goal was definitely laid out for that operation. I should say this was when my father was very active and he has always dabbled in gravel since I can remember. I mean, he had interests in gravel. He was a Teamster actually, the very first job he ever had, he hauled gravel and used to dig it out of the creek and haul it, and there were three of them that did it in the community of Lancaster.

He always had some interest in gravel most of his life.

Q. I see. Now, when did you start the West Seneca operation?

A. I couldn't tell you, but I can verify it if I have to go back and look it up, I can do that, sir.

MR. MANZ: Do you know, Mrs. Muck?

MRS. MUCK: No. I would have to look it up.

MR. MANZ: Just roughly?

MRS. MUCK: No.

MR. MANZ: What year?

MRS. MUCK: No.

MR. WEISS: We can furnish that information to you.

MR. MANZ: All right.

THE WITNESS: Should I put that down and get it for you?

MR. MANZ: Yes.

BY MR. MANZ:

Q. Do you recall whether the West Seneca operation started after you acquired the Alexander operation?

A. I believe, to my recollection, that that would be about right.

* * *

THE WITNESS: Yes. I think she should answer the options.

MRS. MUCK: It is just that I prepared the deeds and that is why I thought I was better qualified to answer.

MR. MANZ: All right.

L O I S M U C K, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. MANZ:

Q. Now, Mrs. Muck, we didn't swear you in before you testified. Now, all these answers and questions, do you affirm them as the truth, the whole truth and nothing but the truth?

A. Yes.

Q. Before we have your brother testify again, there are two deeds that are not marked, and I will now have them marked for identification purposes and ask you what they are.

MR. WEISS: Why don't you call them parts of Exhibit "D", but label them --

* * *

MR. WEISS: What number are you on?

MR. MANZ: That is right at the top.

THE WITNESS: Kreutter, Henry and Odelia Kreutter.

BY MR. MANZ:

Q. Yes. That corresponds with the first item there on Exhibit "E"?

A. Yes.

Q. Now, according to this, there is about five hundred acres or more or less located on Sandpit Drybridge Road in the Town of Alexander, and that is dated August 22, 1957. Have you been excavating from there and taking gravel from this pit since 1957?

A. Yes.

Q. I see. How many more acres are there available?

A. Of gravel or their's?

Q. Yes.

A. I couldn't truthfully answer you. I just don't know. I am not sure.

Q. All right. While we are at it --

A. There is more available, yes. That I can assure you.

Q. Are you half through there, or a quarter through;

or give me a percentage?

A. I would say possibly half; maybe a little more.

Q. All right. So that you have been using it since 1957 and I think that without exception, there were two years where you weren't excavating; is that right?

A. That is correct.

Q. Was that in the -- from June of 1969 to August of 1970?

A. Whatever year the plant was shut down, we didn't excavate.

Q. I show you this little memo that your sister apparently prepared.

A. That would be correct.

Q. So these figures are correct then as to when the plant was shut down, when you didn't use it, or excavate?

A. Yes.

Q. All right. Now, referring to "B" in Exhibit "F" identified as the Waite Property, this is another option and it is indicated on here as 225 acres more or less, and it is dated October 8, 1957?

A. All right. Go ahead.

Q. Right. The question is, have you been excavating and taking gravel from that farm since October 8, 1957?

A. Why don't we combine them? There are two Waites' there. We have taken from both of them. There is Arlon and Ellsworth.

Q. Well, we have them broken down to "B", as far as "B" is concerned, which is "Waite"; Ellsworth Waite. You have been mining there since the time of the option?

A. No.

Q. All right. So when did you start mining there?

A. I am going to guess; about --

MRS. MUCK: You are guessing again, Herb. You better be correct.

BY MR. MANZ:

Q. Give me your best estimate?

A. Well, as an estimate then, I am going to guess possibly --

MR. WEISS: Wait a minute. I object to any guessing.

BY MR. MANZ:

Q. No guessing, please. Just use your best recollection.

MR. WEISS: If you don't know, Mr. Frey, I suggest you consult the records. Guessing is really not proper because Mr. Manz wants accurate answers.

BY MR. MANZ:

Q. Your best estimate?

A. Do you object?

MR. WEISS: Not if you can give an accurate answer.

THE WITNESS: I can't give it accurately.

MR. WEISS: Then don't give an answer. Just furnish it to him, and put it down as material to be furnished. We want Mr. Manz to have accurate answers.

BY MR. MANZ:

Q. Would you say then, Mr. Frey, that you spent less time mining that particular piece of property than it has been in existence?

MR. WEISS: What has been in existence; the land?

MR. MANZ: Strike that out.

BY MR. MANZ:

Q. Mr. Frey, I don't want you to guess and I know you want to be accurate, and I want you to be accurate and I know your lawyer, I think he

wants to be accurate too. However, I want to ask you some of these questions so that I can continue on with my examination here.

Now, do you have any idea of the number of years that you have been mining or excavating gravel from the option that you have with Mr. Ellsworth Waite, which would be "B" of Exhibit "F"?

A. No.

Q. Has that been more than five years?

A. I am not sure.

Q. Okay. Of all the options that you have here which are six, is there one that you are working on now whereas you are not working on the others?

A. No. We work -- we usually work all of them.

Q. Are you working all of these options at the present time?

A. Not all of them, but I think we are working on three or four of them.

Q. All right. Including Schedule "B", the option "B", the Ellsworth Waite property?

A. Yes.

* * *

MR. WEISS: I just asked you to be more specific, Mr. Manz. The 1950's? With whom? From 1950 to 1959?

MR. MANZ: If you know. Do you remember that?

THE WITNESS: Well, it is an awful broad statement which you have made there.

BY MR. MANZ:

Q. Was your company, or any company that you or your father were associated with, involving in purchasing and taking options for the purchase of lands that contained gravel or suspected would contain gravel, from 1950 to 1959, other than what we have been talking about?

A. I would have to say yes.

Q. Okay. Thank you. Was it a similar type or activity from 1959 until, say, 1965?

A. Well, I don't quite know what you are trying to get at, and it is so broad, I can't --

Q. You can't answer that; okay. Now, you answered about 1950 to 1959. Can you think of any pieces of property that you or your father, or any companies that you are associated with had options to purchase lands that contained gravel,

but which you did not exercise?

A. I didn't participate in any of them. My father had participated in securing options basically for his own security, for Pfohl, we helped get him the business and he worked quite extensively doing this. I can't tell you the transactions that took place. That is impossible. I have no paper work on it or anything, but I know he was active, quite active, in helping him. He bought the plant for his own security and he negotiated with Pfohl who owned one piece of gravel land to buy the plant, which they did and he helped him secure gravel for a good many years.

Q. Okay.

A. I could put down, he done this because he wanted to be sure of a long lengthy endless supply of aggregate. He wanted to be sure of a secure price.

Q. Are you reading from something?

A. No. He wanted to have good quality material and he wanted to be competitive. Does that answer your question?

* * *

have more specifics.

A. No.

Q. Okay. We will withdraw that question. Now, just another loose end here, because I have to quit shortly. What is the longest that any one of your employees was ever working for you or been with you at the Alexander Plant?

A. We got all new ones when the plant reopened.

Q. All right.

A. After it was down, because of the no-contract.

Q. None of the old employees are still with you?

A. None.

Q. Except Mr. Muck, who is --

A. Well, he was more than an employee. He is a member of the family.

Q. He is the only one?

A. Yes.

Q. All right. Now, based upon what we talked about today, I want to ask you whether or not you have any detailed ledgers or records of any gravel reserves through leases, ownership, or options?

A. No, sir, no ledgers of any kind.

Q. Now, in connection with your accounting and in

order to take advantage of any depletion accounting -- I will withdraw that question.

Now, since we talked last time, have you talked to anyone in your company that advised you of the manner in which depletion is handled in relationship with the leases that you have for the excavation of gravel?

A. I can tell you we have nothing to do with depletion. We never get involved with it.

Q. You don't take percentage depletion?

A. We don't have anything to take it from. We have never got involved in it.

Q. I see. Mr. Moran says you have to take it?

A. No, no. We -- to clarify that, so you understand, we are buying the gravel from the farmer. We pay him so much for it and that is up to -- that is his tax worry, whether he takes depletion or not. That is not our problem, so we don't get involved in it; never have, let's put it that way. We never owned it prior to taking it, see, and we just don't get involved in depletion; no way, shape or manner.

MR. MANZ: All right. I have something very impor-

tant that I have to do. I wonder if if it would be in order to adjourn now.

MR. WEISS: Okay.

MR. MANZ: Okay. Fine.

(Whereupon, the proceedings in the above entitled matter were adjourned).

* * * * *

JEC:HH:4
7-10-73

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

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GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as Co-Executors of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

- vs -

CIVIL ACTION No. 1970 -

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, Individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

Defendants

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Examinations before trial of HERBERT FREY and LOIS MUCK, held before James E. Crosby, Notary Public, at 425 Statler Hilton Hotel, Buffalo, New York, on Tuesday, July 10, 1973, commencing at 2:00 p.m., pursuant to notice.

APPEARANCES: RAICHLE, BANNING, WEISS & HALPERN
BY: ARNOLD WEISS, ESQ.,
Attorneys for the Plaintiffs.

MANZ, MANZ & DIVIAK
BY: VICTOR E. MANZ, ESQ.,
Attorneys for the Defendants.

* * *

reduction gimmicks or repayments used." and then we go on to discuss what a "gimmick" is. Now, do you recall that testimony?

MR. FREY: Yes.

MR. MANZ: All right. Now, what did you mean by the word, "gimmick"?

MR. FREY: Well, I think farther on down --

MR. MANZ: No, no. Just tell me, sir, what do you mean by "gimmick"?

MR. FREY: I think you covered it in the pages you asked me to read.

MR. MANZ: Yes, but tell me what you mean by "gimmick"?

MR. FREY: Give me that back and I will read it to you; the same pages, I think I just read, covered the gimmicks.

MR. MANZ: All right. Read them?

MR. FREY: "Rebates, gimmicks or special reductions, discounts or considerations." I think considerations, discounts, special reductions -- deductions, or something else that wasn't mentioned here, such as fill, dirt fill.

MR. MANZ: That is your understanding of a gimmick?

MR. FREY: Yes.

MR. MANZ: All right. Do you employ those in the proposals and bids that you make?

MR. FREY: No. I don't think we have them to play with like you people have.

MR. MANZ: No, no. I object to that and ask that it be stricken as not being responsive. You say you do use gimmicks. What type of gimmicks do you use?

MR. FREY: I didn't say we used gimmicks.

MR. MANZ: Mr. Frey, I direct you to Page 267 of the same testimony, and on Line 7 where you state, "Do you want to incorporate there all gimmicks used?"

MR. FREY: Referring to you people, yes.

MR. MANZ: Mr. Frey, I asked you to furnish us with all bids, copies of all commercial bids, propositions, agreements, offers, discounts, discount bids, discount proposals and resulting agreements, contracts or price lists to furnish ready-mixed concrete from 1968 to date, and any memoranda

or list thereof and this, of course, was the definition of what we agreed to as enumerated by your attorney, Mr. Weiss.

MR. FREY: Yes.

MR. MANZ: All right. And I said I agreed to it and then you went on to say, "Do you want to incorporate there all gimmicks used?"

MR. FREY: Yes.

MR. MANZ: All right. And what gimmicks do you use?

MR. FREY: Any gimmicks that were used would have been incorporated in our bid lists.

MR. MANZ: All right. Now, Mr. Frey, do your bids, your proposals, do they show all the gimmicks that you use?

MR. FREY: I don't know whether -- I don't know just how -- excuse me. I don't know whether on our proposals or quotes if they listed the completion of the job, how it was sold, or what was done. I do not know. Maybe you people can tell me. I paid no attention to it.

MR. MANZ: Mr. Frey, the question is, whether or not your proposals and bids showed the gimmicks

that you employed?

MR. WEISS: I would like to state for the record that on Page 271, which you should also show the witness, you asked him, "Did he use any gimmicks" and he said, "I am not sure."

MR. MANZ: Mr. Weiss, we will come to that and you will have your chance. Just a moment. I am not trying to leave anything out.

MR. WEISS: Just ask him whether he used any, not what they are.

MR. MANZ: Mr. Weiss, I will ask him my questions in my way, and you ask your questions in your way. Now, again, for the record, I think this is an indication of Mr. Weiss' attempt to try to tell the witness at a crucial time in a very clever deceitful way of what he should answer and I object to it very strongly and ask that he stop doing this.

MR. WEISS: I am only trying to be helpful to you because the witness obviously --

MR. MANZ: I know how helpful you are trying to be.

MR. WEISS: The witness does not understand what you are doing.

MR. MANZ: I am sure the witness understands better than both of us what I am doing. Now, Mr. Frey, I asked you on Page 269 of the same testimony, if you would illustrate what a gimmick is and I direct you to Line 4, the question by me, and your answer on Line 6. I ask you to read that?

MR. FREY: Yes.

MR. MANZ: All right. Now, you use the term, "finagling to get a job" and "a trick, whatever it is going to take to get the job." What kind of tricks or finagling do you do to get jobs?

MR. FREY: Well, I don't think we use too many tricks.

MR. MANZ: My question was, not how many you used, but what tricks did you use, and what finagling did you use, and do you use, to get jobs?

MR. FREY: Well, most of the time we have to meet competition and whatever is presented to us and if we can find out that it is

pretty much factual, many times we will have to meet it. That includes --

MR. WEISS: Let him finish, please.

MR. MANZ: Go ahead.

MR. FREY: That include anything from occasionally removing a discount, longer terms than are normal in the profession, waiting time, removal of waiting time, or percentage of waiting time, things of that type. We don't have dirt and fill to play with like our competitors.

MR. MANZ: I see. Now, these gimmicks and finagling that you do, is this --

MR. WEISS: I object to the form of the question.

MR. MANZ: Well, he stated he finagles and the tricks he performs.

MR. WEISS: I will object to the form of the question and instruct the witness not to answer in that form.

MR. MANZ: All right. Mr. Frey, you stated that you used gimmicks and finagling and tricks to get jobs. You stated that some of the gimmicks and finagling and tricks are

necessary to meet competition. Is this all competition, or just Pine Hill?

MR. FREY: No. I wouldn't say it is just Pine Hill.

MR. MANZ: Okay. Are you saying that all the competitors use these same devices as you do to win jobs?

MR. FREY: No. I didn't say that.

MR. MANZ: What did you mean by that, your answer previously to the effect that it is just Pine Hill, the defendant, one of the defendants here, but other competitors?

MR. FREY: Our other competitors sometimes resort to reduction of discount time, waiting time concessions.

MR. MANZ: Could you give me any specific examples of jobs in which you resort to a gimmick or trick to obtain the job?

MR. FREY: Not explicitly right now; no.

MR. MANZ: Have you done any recently, say in the last two months?

MR. FREY: I don't know.

MR. MANZ: Can you think of anything in the last year?

MR. FREY: I don't know, sir, not here. I would have

to go back and talk with our salemen on that.

MR. MANZ: All right. Now, who would have knowledge of the gimmicks and the finagling and the tricks that are employed by your company?

MR. FREY: I assume you are talking about whatever it took to get the job, or --

MR. MANZ: Yes. The ones that your salesmen --

MR. FREY: Our salesmen.

MR. MANZ: Do you have to approve each one of these devices?

MR. FREY: I am sorry, sir.

MR. MANZ: Do you have to approve every one of these devices?

MR. FREY: No, I do not.

MR. MANZ: Is there any one particular person who is in charge of making the final decision as to whether a gimmick or any finagling or trick has to be employed to obtain a job?

MR. FREY: Usually our head salesman does.

MR. MANZ: What is his name, sir?

MR. FREY: Doug Burg, B-U-R-G.

MR. MANZ: Has he ever consulted with you about any gimmicks or devices or tricks to get your permission before a bid would be submitted or an agreement made?

MR. FREY: He has consulted with me on occasions when he felt things were going pretty rotten.

MR. MANZ: Now, who in the first instance gave Mr. Burg the authority to make offers of tricks or devices to, what you term, finagling or these gimmicks that you referred to?

MR. FREY: You really got a vendetta on that, don't you? Well, condensed, now, this would have been back when my father was very active in the company, and --

MR. MANZ: Has Mr. Burg been with you since your father was alive?

MR. FREY: He has been with us many, many years.

MR. MANZ: How many years?

MR. FREY: I don't know.

MR. MANZ: And you are stating now that your father, your deceased father, is the one that

authorized him to make these special concessions?

MR. FREY: If necessary.

MR. MANZ: And does he have just unlimited authority to make these concessions?

MR. FREY: If he gets too far out of hand, he can be replaced.

MR. MANZ: So you are saying then that he doesn't have to consult with you every time that he makes a proposal or contacts prospective business people in making his proposals, or bids, about these gimmicks?

MR. FREY: That would be impossible.

MR. MANZ: All right. Now, are there any records in your business concerning these various gimmicks and tricks and finagling that you mentioned?

MR. FREY: No, not that I know of.

MR. MANZ: Is it reflected anywhere on any of your official documents, business records?

MR. FREY: Well, I would say possibly yards went out and billings, I would probably say that would represent that.

MR. MANZ: So if you compared those records with your bids, you would be able to determine what the special concessions were; is that right?

MR. FREY: I would say that would be right.

MR. MANZ: So then the actual billings can devi- and be different than the actual bids or proposals made by you; is that right?

MR. FREY: I am not sure, and I am not prepared to answer that. I can bring you that answer at another time. Why I say that, is because I don't know whether our men listed on their bids any concessions that they had or specialties or anything of that type that they may have done in securing a job. I am not sure whether they put it on the bid quote or not. I would have to check that out. I just don't know.

MR. MANZ: All right. Mr. Weiss, with your approval, I would like to adjourn at this time.

MR. WEISS: When will we reconvene?

MR. MANZ: We will reconvene any time you want, either tomorrow at 2:00 o'clock, or

* * *

EFG:HH:4
7-16-73

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

- -

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as Co-Executors of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

-vs-

CIVIL ACTION
No. 1970 -

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, Individually, and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

Defendants.

- -

Examinations before trial of HERBERT FREY and LOIS MUCK, held before Estelle F. Gafter, Notary Public, at 425 Statler Hilton Hotel, Buffalo, New York, on Monday, July 16, 1973, commencing at 2:00 p.m., pursuant to notice.

APPEARANCES: RAICHLE, BANNING, WEISS & HALPERN
BY: ARNOLD WEISS, ESQ.,
Attorneys for the Plaintiffs.

MANZ, MANZ & DIVIAK
BY: VICTOR E. MANZ, ESQ.,
Attorneys for the Defendants.

* * *

list price and --

MRS. MUCK: We are permitting you to make comparisons. We have absolutely no objection to your doing that.

MR. MANZ: You have no one account that brings it all in and shows the difference?

MRS. MUCK: Why, you should have one account. We don't do things like that.

MR. WEISS: The answer is, she doesn't have it. Mr. Moran will have to look at the records and make his own deductions.

MRS. MUCK: This sounds like double sets of books and we don't run double sets of books.

MR. MANZ: We are not talking about double sets of books. I am talking about your records.

MRS. MUCK: It sure sounds like it to me.

MR. MANZ: We didn't intend it that way. Excuse me, I want to talk to Mr. Moran.

MR. WEISS: Okay.

BY MR. MANZ:

Q. Okay. Mr. Frey, getting back to some of these miscellaneous questions; other than Pine Hill, you have been getting your sand, grit and gravel

from Dan Gernatt?

A. So far you haven't asked the question.

Q. All right. I will rephrase it then, if you don't think I have asked you a question.

Other than Pine Hill, where have you been buying your sand, grit and gravel in the last two years?

MR. WEISS: I don't think he has bought any from Pine Hill. He apparently has been buying from Regent Sand & Gravel or Pine Hill.

THE WITNESS: We bought from --

MR. MANZ: Yes?

MR. FREY: We have.

MR. MANZ: Don't follow his instructions. Whatever you see and hear, don't let him dictate to you; what I say or do.

MR. WEISS: Are you talking about Regent Sand & Gravel?

MR. MANZ: If you want to play games, we will play games. You are not testifying, nor are you being questioned. Let your client answer and stop this game you are playing here.

MR. WEISS: This is a problem. We don't know if we are buying from Pine Hill or Regent.

MR. MANZ: I object to this testimony that Mr. Weiss is trying to get into the record. Go ahead, sir, what do you want to say?

MR. WEISS: You tell me.

MR. MANZ: Just a moment. I am asking a question. In the last two years, Mr. Frey, where have you been buying your sand, grit and gravel?

MR. WEISS: No objection to your question.

MR. MANZ: You are going to get the same thing when you ask questions, and I am going to give it to you threefold. I am going to play the same game only three times as hard. If you want to get on with this, let's get on with it. You will see. Do you want to answer that?

MR. FREY: We bought from where? We bought from DeWitt, Machias. That would be general crushed stone, another name for the same; Machias. We bought from Franklinville. I assume Mr. Manz -- are you referring to

the Lancaster Plant, or all of them?

MR. MANZ: Any?

MR. FREY: Franklinville Sand & Gravel. Dan Gernatt. Frey Sand & Gravel. Pine Hill.

MR. WEISS: And/or Regent.

MR. FREY: And/or Regent, I suppose. Now, are you referring strictly to sand and gravel?

MR. MANZ: Sand, grit and gravel. Grit.

MR. FREY: Sand, grit and gravel.

MR. MANZ: Are there any others?

MR. FREY: I believe that would cover all the sand, grit and gravel.

BY MR. MANZ:

Q. Specifically, where did you get your grit from in the last year?

A. The same people.

Q. The same people?

A. Yes.

Q. There was a time that you used to get your grit from us, that is, Pine Hill, or Regent, or whatever you want to call it, and there came a time when you stopped buying from us; is that right?

A. Yes.

* * *

has answered, and this is the case here.

MR. MANZ: I would like to hear from Mr. Frey.

MR. WEISS: If you direct it specifically to Mr. Frey --

MRS. MUCK: I am sorry.

MR. MANZ: If he doesn't know, he will say, "My sister knows," and then I will ask you.

MR. WEISS: Will you repeat the question, Mr. Manz, or ask it again?

MR. MANZ: For the record, the price for grit, is it cheaper to buy it from the companies that you mentioned than from Pine Hill?

MR. WEISS: Now, may I answer, clarifying? Are you talking about the selling price by supplier? Is that what you mean?

MR. MANZ: That is what I mean.

MR. WEISS: What have you paid to the supplier? Where is it cheaper to buy it?

MR. FREY: Are you combining -- taking a combination of delivery price?

MR. WEISS: Just the grit price.

MR. FREY: Concrete grit price is far cheaper from somebody else than from Pine Hill.

BY MR. MANZ:

* * *

gravel, other than the people that you have -- companies that you have mentioned just previously, and on the occasions that you have testified to, have you ever purchased any supplies from Koppers? Any Koppers subsidiary from Ellicottville?

MR. FREY: In the first place, Ellicottville don't even ring a bell, and I think you mentioned supplies other than sand, grit and gravel.

MR. MANZ: No. No. Other than the companies you mentioned previously?

MR. FREY: Sand, grit and gravel?

MR. MANZ: Yes.

MR. FREY: Ellicottville, right now, I can't even recollect where Ellicottville is.

MR. MANZ: Off the record.

(DISCUSSION OFF THE RECORD.)

MR. FREY: General Crushed Stone is Machias Sand and Gravel.

(Whereupon, a brief recess was taken.)

MR. MANZ: Shall we proceed?

BY MR. MANZ:

Q. Mr. Frey, Buffalo Gravel has been dormant in the

business for about a year or so until just recently; is that a fair statement?

A. I would say yes.

Q. And is it your understanding that they are now more competitive, and are in business, selling jobs?

A. I don't know whether they are selling jobs, but they seem to be around writing more.

Q. Do you know from your own knowledge from, say, the last six months, that they have been submitting bids on jobs that you also have submitted bids on?

A. I couldn't verify that; it is from idle conversation.

Q. Do you know from your own knowledge that they have won any bids that you have bid on?

A. Not from my knowledge; no, sir.

Q. You are familiar with Empire Builders Supplies and Niagara Concrete; are you not?

A. Yes.

Q. Okay. Would you say that within the last two years that they have been doing business in the Town of Amherst and the City of North Tonawanda?

A. Yes, I have heard it said.

Q. Do you know from your own knowledge whether in the last year or two they have been competing with you and other producers in the Buffalo Area?

A. I assume if they have been hauling in our area that they must be in competition with us; yes.

Q. Do you know from your own knowledge whether or not either Empire Builders Supplies or Niagara Concrete has taken a bid from you where they were the low bidder?

A. Not from my knowledge, Mr. Manz, no.

Q. Do you know of any jobs that are presently being worked on by Empire or Niagara located in the Town of Amherst or North Tonawanda?

A. I believe.

MR. WEISS: What?

MR. FREY: T-A-B-E, Niagara Concrete. I think they are doing a road job there now.

BY MR. MANZ:

Q. Do you know where they buy their sand, grit and gravel?

A. No, I don't.

Q. In regard to mixers and trucks in your business,

* * *

FG:HH:4
-8-73

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

- -

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as Co-Executors of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

-vs-

CIVIL ACTION NO. 1970 -

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, Individually, and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the Assets of PFOHL BROTHERS, INC., a dissolved corporatkon, and PFOHL BROTHERS, INC.

Defendants.

- -

Examinations before trial of HERBERT FREY and LOIS MUCK, held before Estelle F. Gafter, Notary Public, at 425 Statler Hilton Hotel, Buffalo, New York, on Thursday, November 8, 1973, commencing at 2:00 p.m. pursuant to notice.

APPEARANCES: BAICHLE, BANNING, WEISS & HALPERN
BY: ARNOLD WEISS, ESQ.,
Attorneys for the Plaintiffs.

MANZ, MANZ & DIVIAK
BY: VICTOR E. MANZ, ESQ.,
Attorneys for the Defendants.

* * *

MR. MANZ: Is that the whole summary that you made in the time that you were out of this office?

MR. FREY: That is right, sir.

MR. MANZ: All right. Now, in regard to your one source of supply, I think that was the first item. Isn't it true that you can buy gravel and aggregate from any other sources other than Pine Hill?

MR. FREY: This is true. We can buy gravel from other sources other than Pine Hill, yes.

MR. MANZ: In fact, you have been doing it all along; right?

MR. FREY: Right.

MR. MANZ: In fact, you have been doing it for your West Seneca Plant?

MR. FREY: Yes, but by that same token, we had a contract.

MR. MANZ: Please just answer my question. We will come to that. All right. Now, have you any official records or documents that pertain to your complaint that refers to the inconsistency of the gradation

* * *

MR. MANZ: Have you ever furnished any of your customers with fill?

MR. FREY: No, we have not.

MR. MANZ: Have you ever given them anything extra or any bonus of any kind in order to get their business?

MR. WEISS: You mean besides extra effort, extra quality and extra --

MR. MANZ: Any bonuses of any kind?

MR. FREY: I don't know what you would consider a bonus.

MR. MANZ: Well, have you used any gimmicks as you phrased it one time to get customers?

MR. FREY: We have had to do things price-wise to meet competition; yes, if that is what you consider a bonus.

MR. MANZ: Have you ever given them any presents, or any other services of any kind?

MR. FREY: The only present we give is at Christmas-time, we pass out candy, unless it is objectionable to them; then we will give out whiskey.

MR. MANZ: We are talking about customers on buying

projects. Have you ever given them anything extra? Have you cut down on, say, delivery time or waiting time in order to --

MR. FREY: The only time we do this is if we are a concession. Is that what you are referring to?

MR. MANZ: Some sort of concession?

MR. FREY: A concession. If we have to meet competition, yes, and that is proven.

MR. MANZ: Now, you do this on bids; is that right?

MR. FREY: No.

MR. MANZ: You do this where you know what the other customer or other competitor is going to give them?

MR. FREY: Normally, I am sure it happens in every supplier's case, the customer will call you in and if he really wants you to supply, he will lay his cards on the table of what he is getting and give you a choice, either do it or not, and if you don't do it, you don't get it.

MR. MANZ: And on these types of jobs, do you

usually lose money, or make money?

MR. WEISS: I object.

MR. FREY: That is a leading question, and I am sure I can't answer it. I am sure we have done work that we have lost money on.

MR. MANZ: Have you bid a price knowingly that you were going to lose money on?

MR. WEISS: Well now, if you can answer that question offhand. If you need to give it consideration, you may give consideration to it and make computations.

MR. MANZ: Just for the record, I have to object to Mr. Weiss instructing his client to answer that question.

MR. FREY: No, I can't point to any particular job that we took knowingly that we were going to lose money on other than there are a few exceptions, hauling the Boy Scouts and that kind of stuff, where you just plain give it to them, but nothing of any consequence, what you call donations or advertising type

deal or somthing of that type. Nothing personally to any moneymaking organization.

MR. MANZ: In other words, when you bid on a big job like the Meyer Memorial, you don't go in there to lose money; you bid to make money, and you try to bid the lowest possible price that you can, is that right?

MR. FREY: Hopefully, yes.

MR. MANZ: And who determines the price; you, your sister or Mr. Doug Berg?

MR. WEISS: I am objecting to the question. You may ask him who determines the price without suggesting answers to him.

MR. MANZ: Answer it the way your lawyer wants you to.

MR. FREY: Well, normally the salesman will handle it. If it is a real severe deal, sometimes I will advise him and if it is a real major job, the salesman, I, my sfster and sometimes our Office Manager will all participate in it and discuss it. We have, on occasions,

called in our acoountant even to help us on something of this type.

MR. MANZ: And are any of these decisions based upon what any of your competitors are bidding, or offering to do the work for?

MR. FREY: This type consultation invariably always involves a competitor, and what he has done and we are going beyond what you call the normal expectation.

MR. MANZ: Whether you can meet the price or not?

MR. FREY: That is right.

MR. WEISS: Let him finish.

MR. FREY: Or want it bad enough to meet the price and if you can figure you can come out with anything at all on it, or what the case may be; it is a decision that has to be reached.

MR. MANZ: Since the year 1968 to the present time, have there ever been any jobs of the larger type that you have refused to bid on because you couldn't meet the competitive price of any competitor?

MR. FREY: I couldn't answer that right now, Mr. Manz.

* * *

626-629 Liberty Bank Bldg.
Buffalo, N. Y. 14202
853-5600

STATEMENTS

EXAMINATIONS BEFORE TRIAL

DEPOSITIONS

CONFERENCES

CONVENTIONS

ARBITRATIONS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY, READY-MIXED CONCRETE, INC., et al,

Plaintiffs.

-vs-

[illegible]E HILL CONCRETE MIX CORPORATION, et al,

Defendants.

Proceedings taken before the HONORABLE EDMUND F. MAXWELL, taken pursuant to notice, at United States Courthouse Building, Buffalo, New York, taken on November 9th, 1974, commencing at 2:30 P.M.

APPEARANCES: RAICHLE, BANNING, WEISS & HALPERN
By ARNOLD WEISS, ESQ.
10 Lafayette Square,
Buffalo, New York,
Appearing for the Plaintiffs.

ARNOLD WEISS
10 Lafayette Square
Buffalo, New York 14203

Jack W. Hunt C. S. R.
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HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR,
By VICTOR T. FUZAK, ESQ.,
1800 One M & T Plaza,
Buffalo, New York,
Appearing for the Defendants.

MANZ, MANZ & DIVIAK,
By VICTOR E. MANZ, ESQ.,
425 Statler Hilton Hotel,
Buffalo, New York,
Appearing for the Defendants.

PRESENT: SANTO VITRANO, Reporter.

MAGISTRATE MAXWELL: Gentlemen, for the purposes of the record this is the continuation of depositions by the Defendant, Plaintiff's witnesses in the matter of George C. Frey, Ready-Mixed Concrete, et al, against Pine Hill Concrete Mix Corporation, Civil Number 1970-277. The deposition is being taken before me as a result of an order by Judge Curtin referring discoveries of matter to me. It's my understanding that pursuant to stipulation of counsel this deposition is being taken before me at this particular time. As to any such change of the methods of the deposition it may be mutually acceptable to counsel as we go along. It's my understanding further that by agreement of

counsel the testimony of Mr. Burg I believe will be taken at this time, is that right, Mr. Fuzak?

MR. FUZAK: That is right.

MAGISTRATE MAXWELL: Mr. Weiss?

MR. WEISS: Yes.

MAGISTRATE MAXWELL: Mr. Burg, would you raise your right hand and put your left hand on the Bible?

A. D O U G L A S B U R G , after being duly called and sworn, testified as follows:

MAGISTRATE MAXWELL: Will you give your full name, please?

THE WITNESS: A. Douglas Burg, B-U-R-G.

MAGISTRATE MAXWELL: Mr. Fuzak?

DIRECT EXAMINATION BY MR. FUZAK:

Q. Mr. Burg, by whom are you employed, please?

A. Frey Ready-Mixed Concrete Company.

Q. That company is still in existence, is it, sir?

A. Yes.

Q. Okay. What is your position with Frey Ready-Mixed Concrete?

A. I'm the sales manager.

MR. WEISS: I think unless you think it's important, I would like to correct the record, I think correct it, I think the proper name is Frey Concrete, Inc., the witness may not know if that is what you're alluding to.

MR. FUZAK: Well, I wasn't sure whether -- is there some motion before the Court to change the name of the parties, am I correct then that there -- that the two Plaintiff corporations George C. Frey Ready-Mixed Concrete and George C. Frey Batching Plant, Inc. has been merged into Frey Concrete, Inc.?

MR. WEISS: I'm not sure whether one was merged into the other or they were consolidated, but the resulting corporation is Frey Concrete, Inc., and we can give you exactly which one was merged into which.

MR. FUZAK: But Mr. Burg then is apparently employed at this point by Frey Concrete, Inc.?

MR. WEISS: Yes, he may not know that and this is not his department but that is the active --

MAGISTRATE MAXWELL: Do you understand that Frey Concrete, Inc. is going to be the successor Plaintiff?

MR. WEISS: There is a motion before the Court to that effect.

MAGISTRATE MAXWELL: Go ahead.

MR. FUZAK: You are at this time the sales manager of Frey Concrete, Inc.?

THE WITNESS: Yes.

BY MR. FUZAK:

Q. And, previous to that you acted, did you, as sales manager to Frey -- George C. Frey Ready-Mixed Concrete, Inc.?

A. That is correct.

Q. Over what period of time have you been employed by those corporations as sales manager?

A. Twenty some years.

Q. You've been sales manager throughout that entire period, Mr. Burg?

A. Yes.

Q. Now, would you describe what your duties are at the

present time as sales manager?

A. Well, I'm employed to go out throughout the Buffalo area and sell Ready-Mixed Concrete.

Q. And, are those your sole duties, do you do anything else but sell concrete?

A. That is ninety-five percent of my duties. Occasionally I have to hold a customer's hand or something like that, but basically I'm out to sell concrete.

Q. And, has that been the case since 1968 for example?

A. Yes.

Q. And, there has been no change in your duties throughout that period of time?

A. That is true.

Q. And, during that period of time since 1968 to date, how many other salesmen have been employed on a regular basis by the Plaintiff corporation here, either Frey Concrete, Inc. or George C. Frey Ready-Mixed Concrete, Inc.?

MR. WEISS: Excuse me, what was the date, '68?

MR. FUZAK: '68.

THE WITNESS: We have had two salesmen working during that period of time.

BY MR. FUZAK:

Q. Can you give me their names, please?

A. One was Rocco Verel, V-E-R-E-L and the other one is Metro Kushman, K-U-S-H-M-A-N.

Q. And, how long has Mr. Verel been employed as a salesman by the Plaintiff corporation?

A. He is not presently employed by us, he was employed by us probably for six years.

Q. Until what time, when did he discontinue his employment?

A. I can't really say, I can look that up and --

Q. Can you give me an estimate, was it this year, to your best recollection?

A. No, it has been probably five or six or seven years, something like that since he's been employed by us.

Q. And, how about Mr. Metro Kushman, over what period of time has he been employed by the company?

A. Mr. Kushman has been with us, I would say approximately eight years.

Q. Are Mr. Kushman's duties the same as yours essentially, to go out and solicit business and get orders?

A. Yes, yes, they're the same as my duties.

Q. And, he reports to you, does he as sales manager?

A. We -- yes, he reports where he has been and what he has done and so forth as far as selling.

Q. Now, in performing your duties as sales manager, as you have described them, over what geographic territory do you work? Can you describe it in terms of counties or something of that nature?

A. I'd say the Greater Buffalo area, it's really basically mostly Erie County.

Q. The Greater Buffalo area, mostly Erie County?

A. Correct.

Q. Do you make any sales outside of Erie County?

MR. WEISS: Excuse me, are you speaking now, Mr. Fuzak, of him personally or of the company in general?

MR. FUZAK: I'm speaking of both, I'm speaking of the company in general, to your knowledge, does the company in general make sales of Ready-Mixed Concrete outside of Erie County?

THE WITNESS: Upon occasion we might go into Niagara County.

BY MR. FUZAK:

Q. Yes. And, that is about the extent of the distance away from your plant and premises that you go in

terms of selling Ready-Mixed Concrete, occasionally to Niagara County?

A. I would say, yes.

Q. And, has that been the case since 1968 to your knowledge?

A. Yes, our boundaries have remained pretty much the same, our selling area.

Q. Now, during this period of twenty years that you have been employed by -- I'm going to call it the Plaintiff corporation, we know what we're talking about, I take it, I am -- am I correct that you have gained a good deal of experience and expertise in this field in this particular area of the Greater Buffalo Erie County area, in the Ready-Mixed Concrete business I'm talking about?

A. I have tried to, yes.

Q. All right. Would you tell us what procedures are followed by the company or have been followed by the Plaintiff corporation since 1968 with respect to the pricing of Ready-Mixed Concrete to customers served by the Plaintiff corporation?

MR. WEISS: Could I get some clarification to that, what do you mean procedures?

MR. FUZAK: I mean --

MAGISTRATE MAXWELL: Mr. Burg, do you understand the question?

THE WITNESS: I don't really understand.

MAGISTRATE MAXWELL: Maybe you can clarify it, Mr. Fuzak.

MR. FUZAK: Mr. Burg, does the Plaintiff corporation, has the Plaintiff corporation since 1968 maintained any kind of a basic price list for the Ready-Mixed Concrete that it sells to various people in the area?

THE WITNESS: Yes.

BY MR. FUZAK:

Q. And, is that a -- do you have a list price for Ready-Mixed Concrete that you publish to customers, various customers?

A. Yes, we have a basic list price, yes.

Q. Now, when you go out and let's talk about you personally, in terms of your work as sales manager and as a salesman, when you go out to solicit business for the Plaintiff corporation, do you at all times offer the list price and only the list price to the customer?

A. No.

Q. Well, are there occasions when you offer the customer the proposed or prospective customers a price which is less than your list price?

A. Yes, that is correct.

Q. And, there have been such occasions I take it since 1968 to date?

A. That is correct.

Q. All right. Will you describe under what circumstances such offers of prices less than your list prices are made to prospective or proposed customers of the Plaintiff corporation?

A. Well, for instance, if a job had a large volume and was situated very closely to our plant, we would take these things into consideration in our pricing.

Q. Now, when you say a large volume, can you give me some general idea of what you mean by large?

A. Well --

MAGISTRATE MAXWELL: Why don't we put the microphone right in front of you, Mr. Fuzak, I'm certain the reporter is never going to need the disk to listen to, to verify it, but it always comes in handy.

MR. FUZAK: I see.

THE WITNESS: Would you repeat that, please?

BY MR. FUZAK:

Q. Yes. You mentioned that on some occasions prices less than the list prices are charged by reason of the fact that the customer is closer to your plant and that a large quantity of a product is involved and my question to you is, can you give me some indication of what you mean by a large quantity?

A. Well, actually it would be anything in the, oh, maybe over a hundred yards or something like that is considered a large quantity at the present time.

Q. And, when you talk about closeness to your plant, what do you have in mind there, what kind of distance are you making reference to?

A. Well, I would say anything within three miles, two miles.

Q. Now, does the Plaintiff corporation maintain any kind of schedule of discounts depending upon the quantity of the sale involved and the distance to be traveled with that quantity?

A. Each job is taken as an individual case in the commercial field or the individual job field.

Q. Let me ask you on that so the record is clear, when you refer to commercial field, what do you mean by commercial?

A. Well, this would be anything wher[illegible] general contractor would be bid in the form of schools or garages or something that usually other than house-work, or garage work would be considered commercial business.

Q. All right. And, your answer then, anything that is other than residential work, including houses and/or garages would be regarded as commercial work?

A. Yes, I would say so.

Q. Now, did I understand you to say that there is no fixed schedule of discounts that the c[illegible]pany operates from on the basis of the quantity of goods being sold and the distance being transported?

A. Yes.

Q. There is none?

A. We have a standard of fifty cent discount for bills that are paid within ten days of billing.

Q. Now that is a prompt payment discount?

A. That is correct.

Q. And, is that discount available to all customers,

commercial customers?

A. Yes, it is.

Q. All right. But what I'm asking you about is whether or not the Plaintiff corporation maintains a schedule which indicates what discount is to be provided in various cases such as where a certain number of tons or yards of concrete is involved and a certain transportation distance is involved?

A. We have no fixed schedule. We will determine what our price will be pretty much by what the market is at that particular time.

Q. Well, am I correct then, that what you're saying is that while the company does not have a fixed schedule of discounts, dependent upon quantity and/or distance, it handles the giving of such discounts on a case by case, customer by customer, basis, is that right?

MR. WEISS: I think he did say something about market conditions also.

MR. FUZAK: Well, I'm talking about the market at any given point in time.

MR. WEISS: I'm sorry.

MR. FUZAK: Assuming the market.

MR. WEISS: Yes.

MR. FUZAK: In other words, I don't want to have any confusion, Mr. Burg, the company does not have a fixed discount schedule based upon volume and distance of transporting your Ready-Mixed Concrete, is that correct?

THE WITNESS: That is correct.

BY MR. FUZAK:

Q. All right. When the company gives such discounts or lower prices than its list prices, it does so I understand on the basis of each particular case as it comes up, is that right?

A. That is true, each case is discussed individually.

Q. And, who makes those decisions as to what discount will or will not be given from the list price to a particular customer at a particular time?

A. Mr. Frey and Mrs. Muck.

Q. Mr. Herbert Frey?

A. Mr. Herbert Frey.

Q. Do you make that decision yourself at any time?

A. I can make recommendations but Mr. Frey and Mrs. Muck make the decisions.

Q. And, in each case then when you have one of these

situations evolve where you have a customer that you think ought to have some kind of quantity or distance discount you go to Mrs. Muck and Mr. Frey and get their approval or their say so as to what it ought to be if anything, is that right?

A. That is correct.

Q. Now, you made mention of your -- these prices that you charged being dependent in some measure at least on the market conditions, do you remember that?

A. Yes.

Q. What do you mean by that, could you explain that a little further?

A. Well, in the last three or four years, we have had a situation where the price was dependent very much on what our chief competitor was quoting. And, we have had to be pretty much working in a situation where pricewise we had to be competitive and by being competitive we were forced to take jobs that were much less than we normally would have taken the jobs for.

Q. And, that has been the case, has it not, during the basically, the entire period of time that you have

been employed by the Plaintiff corporation, that is that the corporation has to meet the competition generally, is that what you're saying?

A. I would say yes.

Q. Now, just conclude this so I don't have any misunderstanding, I am -- strike that. The company does not then have a published discount schedule, is that correct?

A. We have a fifty cent discount that we allow them.

Q. That is the prompt payment discount?

A. That is correct.

Q. But other than that, the Plaintiff corporation does not publish to its customers any kind of a schedule showing that discount will be granted under certain circumstances relating to the volume and/or the distance of shipment?

A. No.

Q. Okay. When a situation arises, Mr. Burg, where you believe that a discount should be granted to a particular prospective customer, how do you go about determining how much that discount should be, in your view, your recommendation?

A. Well, the determining factor could be, number one,

the closeness, number two, the type of job taking into consideration how quickly the concrete or how slowly the concrete could be discharged, and the truck could be back. Number three, the type of contractor, his payment record, there is other things that I can't think of right now.

Q. Well, do you have any kind of a mathmetical formula that you apply when you're dealing with questions of volume and closeness of the customer to determine how much discount should be applied in a given situation?

A. I don't have.

Q. Do you know whether or not Mrs. Muck or Mr. Frey have such a formula or such a method of determining any proposed discount?

A. I really couldn't answer you, I don't know.

Q. Well, when you have these discussions with Mr. Frey or Mrs. Muck about whether a discount should be given to a particular person or customer, under particular circumstances, when is the decision made? Is it made generally speaking right then and there or is it made sometime thereafter?

A. As a rule, it's not a snap decision, there is some

time taker, consideration taken.

Q. Now, in connection with sales that the Plaintiff corporation has made with Ready-Mixed Concrete since 1968 to date, does the Plaintiff corporation offer to certain customers or prospective customers other benefits that would have the effect of reducing their net costs other than an outright price discount, is what I'm talking about?

A. We have at times met our competitors practices.

Q. Excuse me, whether you've met your competitors practices or not, that wasn't my question, my question is whether in fact since 1968 to date the company has used other methods of giving a particular customer at a particular time lower net costs and the list price for the Ready-Mixed Concrete that you proposed to sell?

MR. WEISS: Your Honor, I submit the witness answer the question.

MAGISTRATE MAXWELL: Well, I think if there are other competitors practices he can outline what practices the company uses regardless of what --

MR. WEISS: Because the question is what have you

used and they're two different things, saying what have you used or done, I think used connotes more of a practice --

MAGISTRATE MAXWELL: He can explain.

MR. FUZAK: But your Honor, I didn't ask for any editorial comments as to why they were or were not.

MAGISTRATE MAXWELL: I realize that, you asked what they are.

MR. FUZAK: That is right, can you answer that?

THE WITNESS: Can you repeat that?

MR. FUZAK: I'll try to, sir.

THE WITNESS: So I can clear my thinking.

BY MR. FUZAK:

Q. My question to you, sir, is whether or not since 1968 to date the Plaintiff corporation has used other methods than outright price discounts to offer Ready-Mixed Concrete to proposed customers at a net cost which is lower than the list price that you maintain?

A. Yes.

Q. Can you describe some of those methods that have been used during that period of time?

A. Well, upon occasions one will come to us and say, "We have a price from a competitor and your price is somewhat higher." And, also there is a waiting time difference, for instance it would be something like a job where there is unwarranted excessive waiting time credits that are given and in turn they ask us if we can meet this particular practice.

Q. For the record I would move to strike that answer. Mr. Burg, so that you and I understand each other, my question to you is not what other companies might do, my question to you is what methods has your company, the Plaintiff corporation here employed to give a proposed customer a net cost for Ready-Mixed Concrete which is lower than the list price other than an outright price discount?

MR. WEISS: Your Honor, I would make -- I see -- would your Honor prefer if I stand?

MAGISTRATE MAXWELL: I don't care.

MR. WEISS: I would state that there are two different -- marketly two different things. One thing, sometimes you can do something in competition in response to a -- what a competitor is doing which you might not be

able to do directly, and meeting competition is a time honored defense to an antitrust file.

MAGISTRATE MAXWELL: That isn't the question, the question isn't whether they're trying to meet competition but what practice they're using, this will cut them at cost, are you giving S & H Green Stamps or are you giving a free car at the end of the year, what practice do you follow without reference to whether the competition does or doesn't do it?

MR. FUZAK: I'll object to counsel's stating here before the witness as we're having this questioning what might constitute a valid defense to an antitrust claim.

MAGISTRATE: That is a legal question that doesn't bother me.

MR. FUZAK: No --

MR. WEISS: I would say then your Honor that it appears to me that an occasional practice is not doing it but it is generally classed as meeting competition and I would ask the

witness to leave out of his answer ary specific things that are done that he considers just to meet competition because unless it's --

MAGISTRATE MAXWELL: I think, do you understand the question, Mr. Burg?

THE WITNESS: I'd like to have it repeated, then?

MAGISTRATE MAXWELL: Will you repeat the question and as I understand it on what specifically has been done.

MR. FUZAK: That is correct.

MAGISTRATE MAXWELL: Okay.

MR. FUZAK: Mr. Burg, my question is not what may or may not be done to meet competition or otherwise, my question is simply this, since 1968 to date what methods has the Plaintiff corporation used to give to a proposed customer a net cost for Ready-Mixed Concrete which is less than the list price other than a discount for list price itself?

MR. WEISS: I would like to record an objection to the question.

MAGISTRATE MAXWELL: Fine. Your objection is noted.

THE WITNESS: I'd have to say basically it would be on occasion waving of the waiting time.

BY MR. FUZAK:

Q. May I stop you there. What do you mean by that, waiving the waiting time?

A. We have a standard in our business that we charge waiting time for the trucks on the job. First, let me -- if I may start over, we allow five minutes per yard, free time to unload a truck. For instance, if it's a seven yard load, that means that at the end of thirty-five minutes our customer charged so many cents per minute over that time.

Q. All right. May I interrupt you there for a minute?

A. Yes.

Q. When you talk about your trucks waiting, you're talking about these Ready-Mixed Concrete trucks?

A. That is correct.

Q. When you said at the beginning of your answer we have a standard in our business, does that refer to the Plaintiff corporation or does that refer to your understanding of the business in this area as a whole?

A. I believe that the business in the area has a waiting

time charge, it's a standard with us at Frey Concrete.

Q. You were making reference to Frey Concrete standard of five minutes per yard allowable waiting time?

A. That is correct.

Q. And, over that your standard is to charge for any excess waiting time beyond that?

A. That is correct.

Q. Is that charged based upon what the cost of your labor is involved with the truck and the cost of the truck itself?

A. That is correct.

Q. Okay. And, do I understand that during this period we're talking about, and we're talking about 1968 to date, that there have been occasions when your company has waived this waiting time standard?

A. Yes.

Q. When you waive the waiting time standard, does that have the effect of reducing the net, final cost of the product to the customer?

MR. WEISS: Well, your Honor, that is an ambiguous question.

MAGISTRATE MAXWELL: If the witness understands it, he

can answer it.

THE WITNESS: I really can't understand it because you don't know at the time that this job goes how much waiting time would be involved?

MR. FUZAK: Well, if you charged the waiting time, the net ultimate cost to the customer would be more than if you didn't charge it, am I right?

THE WITNESS: As a rule, yes.

MR. WEISS: Your Honor, that is confusing, maybe Mr. Fuzak doesn't understand, you don't charge for waiting time, it's not a charge that is made unless there is waiting time if that equipment -- if there is waiting time--

MAGISTRATE MAXWELL: I think it's clear as I understand the standard of this Plaintiff, is that they have a five minute free waiting time per yard and under normal circumstances if there is more than that waiting time involved, there is a charge, and under certain circumstances that waiting time is waived,isn't that right?

THE WITNESS: That is right.

MR. FUZAK: And, the Plaintiff corporation has done that on some occasions since 1968 to date?

THE WITNESS: Yes.

BY MR. FUZAK:

Q. Now, can you tell me on how many occasions that has been done?

A. I couldn't answer that, no.

Q. Can you give me some estimate based on your own knowledge and experience with that company?

A. I could, I could check into it and come up with maybe some kind of an answer, but I just couldn't say offhand.

Q. Well, is it once or twice a year, is it more than that, you must have some --

MR. WEISS: I submit he said he can't do it.

MAGISTRATE MAXWELL: All right. Go ahead Mr. Fuzak.

MR. FUZAK: Mr. Burg, based on your own knowledge and your own experience here, you know do you not, whether this type of waiting time occurs more than once or twice a year, don't you?

THE WITNESS: Yes.

BY MR.FUZAK:

Q. Can you give me some estimate of how many times a year it occurs?

A. I couldn't really truthfully say how many times. It's something that occurs.

Q. With some degree of frequency?

A. Periodically.

Q. Periodically. Does it occur on some degree of frequency on a weekly basis for example?

A. As I said before it's more apt to occur at the start of a job, in other words, a certain job in order to qualify against your competition, this is an agreed to thing that is done and it would be done throughout that particular job.

Q. It would be some agreement that would made between your company and the customer before the job begins?

A. It would be discussed before the job begins, that is right.

Q. Any agreement would be made, would it not, that you would agree to waive waiting time?

A. That is correct.

Q. Now, has the company, the Plaintiff corporation used any other methods besides price discounts and

the waiving of waiting time to offer to certain customers prices which are lower, net prices which are lower than the list prices?

A. I can't think of none at this time, no.

Q. Can you give us the name of any customer or customer of the Plaintiff corporation to which you generally give this privilege of waiving the waiting time?

MR. WEISS: Your Honor, this is -- I'd like to interpose an objection at this time because the witness previously wanted to tell the occasion on which it was done, and now, and he was prevented from doing so, and so -- and so he said that we do this without regard to the fact of how it is done. Now he's being asked to what customer it is habitually being done.

MAGISTRATE MAXWELL: Your objection is noted, can you answer the question, Mr. Burg?

THE WITNESS: It's not done to any particular customer, it's done as a rule on a job, specific job basis.

BY MR. FUZAK:

Q. In other words, is it correct to say that no

particular customer of the Plaintiff corporation habitually over the last years from 1968 to date has gotten this waiver of waiting time?

A. I don't believe so, I'd have to check definitely, but to my knowledge no specific customer has had an agreement over --

Q. I'm not talking about an agreement that has -- that covers a long period of time, I'm talking about the actual fact of whether or not the company has one or more customers which might habitually get this waiver of waiting time between 1968 and today?

A. We do have more than one customer, more than one job that has this waiting time bypast...

Q. And, I'm sure you can recollect some of those customers and give them to us here, can't you, sir?

A. Now?

Q. Yes.

MR. WEISS: What is the question, a customer that what, I think there is a --

MAGISTRATE MAXWELL: Names of customers who have been habitually over a period of time been given waivers of waiting time charges?

MR. WEISS: Okay.

THE WITNESS: I'd have to sit down and make out a list for that, I couldn't do it right off the top of my hat.

BY MR. FUZAK:

Q. Mr. Burg, you can't as you sit there give us the name of one such customer from your own memory?

A. No, I can't right at the moment.

Q. Do you yourself personally deal with certain customers for the Plaintiff corporation?

A. I do.

Q. In other words, you have the responsibility of certain customers, is that right?

A. Yes.

Q. Will you give us the names of some customers that you have that responsibility of?

A. Well, I usually handle Siegfried Construction, John W. Cowper Company.

MR. WEISS: I'm sorry, I didn't hear that.

THE WITNESS: John W. Cowper, Carpenter and Skaer. There is numerous ones but they just don't come to my mind right at the moment, those are three good sized accounts that I handle.

BY MR. FUZAK:

Q. Those are three of the larger commercial accounts you handle, is that right, sir?

A. Yes.

Q. How about those companies, do any of those companies normally or habitually get a waiver of waiting time?

A. As I said, it's on an individual job basis.

Q. I understand that, but as a practical matter and as a matter of fact over the years these past years, from 1968 to date, have any of these companies actually habitually gotten a waiver of waiting time?

A. Some have had a waiver of the waiting time, yes.

Q. Which ones, please, Siegfried possibly on one or two jobs.

MR. WEISS: See, I object to that your Honor, the questions habitually, not one or two jobs, and I move to strike out the answer.

MR. FUZAK: It is an answer.

MAGISTRATE MAXWELL: The answer will stand.

MR. FUZAK: How about John W. Cowper?

THE WITNESS: On some jobs.

MR. FUZAK: What porportion of jobs would you say that the waiver of waiting time applies to?

MR. WEISS: On Cowper or --

MR. FUZAK: On Cowper.
THE WITNESS: I would say probably one out of three, something in that area.
MR. WEISS: You say one out of three?
THE WITNESS: One out of three.
MR. FUZAK: How about Carpenter and Skaer?
THE WITNESS: Maybe one out of the last three or four jobs they have had.
BY MR. FUZAK:
Q. And, prior to the last three or four jobs, was that about the ratio that Carpenter and Skaer got the waiver of waiting time?
A. No. Prior to that waiting time was quite religiously adhered to until the market was such that we were not able to continue this practice and obtain any work.
Q. Have you given over this period we're talking about a waiver of waiting time to Frank Siminelli?
A. On some of his jobs, yes.
Q. Have you given the waiver of waiting time to Albert Elia during this period of time?
A. In some cases.
Q. Can you think of any other companies as you sit

there that the waiver of waiting time has been given to?

A. I can't, I can't think right offhand, sir.

Q. Now, in connection with the Plaintiff corporations sale of Ready-Mixed Concrete, does it have a standard minimum trucking charge?

A. That is correct.

Q. Could you describe for the record what that means, minimum trucking charge?

A. Well, at the present time anything under five yards is charged,a trucking charge is made.

Q. Can you tell us the amount of that trucking charge?

A. I believe it starts, and I may be off somewhat on this, but it starts at twenty, starts at five dollars for five yards, ten dollars for four to five yards, fifteen dollars for three to four yards, twenty dollars from a yard to two yards and twenty-five dollars for one yard.

Q. Now, has the Plaintiff Corporation from 1968 to date waived the minimum trucking charge on occasions?

A. When competition dictates on occasion, yes.

Q. Well, regardless of whether competition dictates in your view or not, your answer is there are

occasions or have been occasions when the minimum trucking charge has been waived?

MR. WEISS: I object to the characterization and submit the answer was correct and proper.

MR. FUZAK: Your Honor --

MAGISTRATE MAXWELL: Your objection is noted, you can answer if you are able to, Mr. Burg.

THE WITNESS: Yes.

MR. FUZAK: Excuse me just a minute.

MAGISTRATE MAXWELL: Sure.

MR. FUZAK: So that procedure on occasion of waiving the minimum trucking charge would also have the effect of reducing the standard or list price of the product sold in those instances, is that right?

MR. WEISS: Potentially you mean?

MAGISTRATE MAXWELL: If he is able to answer, he can answer.

THE WITNESS: If there were any small loads involved, yes.

MR. FUZAK: Well you don't -- do you waive it when there are no small loads involved?

THE WITNESS: It's not --

MR. WEISS: I object, your Honor, it's begging the question.

MAGISTRATE MAXWELL: Let him answer if he is able to.

THE WITNESS: Would you repeat it again?

MR. FUZAK: Do you waive the minimum trucking charge when there are no small loads involved?

THE WITNESS: The minimum trucking charge is never waived unless someone approaches you and says, "We have a competitor --" or, "We can buy the concrete," and prove to me or at least to my satisfaction that they have this, it's never waived otherwise.

BY MR. FUZAK:

Q. But when you do waive the minimum trucking charge, that has the effect, does it not, of reducing the cost of the product you're selling to that particular customer, isn't that fair?

MR. WEISS: I'll object to the question, your Honor.

MAGISTRATE MAXWELL: Your objection is noted.

THE WITNESS: If there were many small loads it would reduce the cost, yes.

BY MR. FUZAK:

Q. And, has that in fact happened with respect to sales by your company since 1968 to date? Where you have received less from the particular customer than you would have received had you not waived the trucking charge?

A. Well, I would assume that is a fair assumption, yes.

Q. That is a fact, isn't it?

A. Yes.

Q. Sure. And, have there been occasions, Mr. Burg, when the Plaintiff corporation has permitted the prompt payment discount after the payment period has expired?

A. Well, that is not my department basically.

Q. Well --

A. So --

Q. Excuse me, go ahead, I'm sorry.

A. So I wouldn't -- I would want to check and see if this has happened.

Q. Well, to your knowledge as a salesman handling many accounts has this happened since 1968 to date?

A. It is possible that if someone was a day or two

late, certainly they would not be -- the discount would possibly be allowed.

Q. No, I don't want to get you involved in possibilities, what I'd like to ask you is whether or not to your knowledge this has occurred, to your personal knowledge this has occurred during this period of time that this prompt payment discount has been permitted after the payment period has expired?

A. I'm sure it has.

Q. Excuse me, your Honor, for just a minute.

MAGISTRATE MAXWELL: Yes.

MR. FUZAK: Mr. Burg, during the cold months of the year, does your company have a standard charge for heating concrete in order to keep it workable until it arrives at its destination?

THE WITNESS: Yes, we do.

BY MR. FUZAK:

Q. And, can you tell me what that charge is, do you know?

A. One dollar per cubic yard.

Q. Now, during the period 1968 to date, has the Plaintiff corporation on occasion either waived or

reduced that heating charge?

A. I do not recall any such occasion.

Q. You personally don't know of any, is that right?

A. Right.

Q. Mr. Burg, has the Plaintiff corporation from the period 1968 to date on occasions given rebates of prices paid by certain customers for products sold to them by the Plaintiff corporation?

MR. WEISS: Could I have that more clearly defined, Mr. Fuzak?

MR. FUZAK: Yes. When the product has been paid for and subsequently a rebate check or some amount is paid back to the customer, you understand what a rebate is, don't you, Mr. Burg?

THE WITNESS: Yes, I do not recall any such occasion of any rebate.

MR. FUZAK: You don't know of any personally yourself?

THE WITNESS: No, I don't.

MR. FUZAK: Your Honor, we thought we might take a few minutes break at this time if it's all right?

MAGISTRATE MAXWELL: I'll take it too then.

(Whereupon, at 3:25 P.M. a short recess was then taken.)

(Whereupon, at 3:35 P.M. the proceedings were reconvened.)

MAGISTRATE MAXWELL: All right, may I remind you Mr. Burg you're still under oath.

THE WITNESS: Yes, sir.

BY MR. FUZAK:

Q. Mr. Burg, has the Plaintiff corporation during the period 1968 to date provided price discounts to Stimm Associates, Inc.?

A. There again, it would be yes, on a job to job basis.

Q. And, to your knowledge, has the Plaintiff corporation on occasion provided Stimm Associates, Inc. with a waiver of waiting time?

A. On a job basis, it's possible, yes, that is not my account.

Q. That is Mr. Kushman's account?

A. That is correct.

Q. Is Williams Higgins your account?

A. I would say yes.

Q. During this period we're talking about, has the Plaintiff corporation afforded William Higgins price discounts?

A. We have met prices that he has had on jobs.

Q. So, in other words, are you saying that there have been occasions that your company has afforded Williams Higgins price discounts from your list price, is that right?

A. Yes, that is correct.

Q. And, is the same true with respect to Union Concrete?

A. That is a good question, Union Concrete had a particular job, a State job, where I quoted a price of twenty-seven dollars and my competitor quoted the price of twenty-two dollars.

Q. That isn't an answer to my question, is it?

MAGISTRATE MAXWELL: Let him finish.

MR. FUZAK: I thought he was finished.

MAGISTRATE MAXWELL: Are you finished?

THE WITNESS: Yes.

MAGISTRATE MAXWELL: Oh, okay.

MR. FUZAK: But that is not an answer to my question, Mr. Burg, my question is during the period

that we're talking about, has the Plaintiff corporation given Union Concrete price discounts on occasion?

THE WITNESS: To meet competition, yes.

BY MR. FUZAK:

Q. For whatever purpose, sir?

A. Yes.

Q. Thank you. Is it your testimony here today Mr. Burg, that under no circumstances to your knowledge did the Plaintiff corporation give any price discounts to a customer unless the customer first came to the company, to your company and said that the competition was doing it?

A. I'd like to have you say that again, because I don't quite understand exactly the full meaning.

Q. All right. Let me turn --

MR. WEISS: Could I clarify one thing for the record, Mr. Fuzak, your Honor, when you say price discount, aren't you really meaning something like price reduction, you don't mean a percentage price, you mean a reduction from the list price?

MR. FUZAK: I was talking about what we were talking

about in the first part of the deposition.

MR. WEISS: So long as we --

MAGISTRATE MAXWELL: Read the question.

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: No.

BY MR. FUZAK:

Q. In other words, it's true is it not that there have been occasions during this period of time, 1968 to date, when your company, the Plaintiff corporation has granted price discounts from the list price without having first been told by the customer that the competition is giving them a discounted price?

A. The market today is such that the commercial people are not buying any concrete to speak of at list price, we're living in a -- I'd say a price situation that is four years or so behind the times. In other words we have prices on the market that do not truly reflect what our costs are.

Q. I found that very interesting, but would you answer my question however, the one I asked of you?

MAGISTRATE MAXWELL: Maybe you could read it back.

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: It's true.

BY MR. FUZAK:

Q. Now, does the Plaintiff corporation also afford these -- strike that. I forgot something. It's also true, is it not that some of these other methods that we have been talking about, such as waiver of waiting time and no minimum trucking charge and so on, are offered by the Plaintiff corporation to a prospective customer without that customer first telling you that someone else has made the same offer?

A. Not by me.

Q. Pardon me?

A. No, sir, not by me.

Q. Not by you. By anyone in the company to your knowledge?

A. Not to my knowledge.

Q. You don't know whether they do or don't, is that right?

A. I'm not with Metro, he's basically the only other salesman we have.

Q. During this period of time that we're talking about, has Mrs. Muck been involved in making any sales of Ready-Mixed Concrete?

A. As I said, when we discussed these individual jobs, usually Mr. Frey and Mrs. Muck are in on the discussions or we discuss this with them.

Q. All right. My question I should have stated it this way, during this period of time has Mrs. Muck, herself, had dealings with any prospective customers of the Plaintiff corporation in terms of selling Ready-Mixed Concrete?

A. I don't understand, would you -- do you mean direct the selling?

Q. Yes.

A. I don't believe to my knowledge she has.

Q. How about Mr. Herbert Frey, has he been involved in direct contact with the customers with reference to selling those customers the Ready-Mixed Concrete during this period?

A. He has talked to customers, be it about sales or not, I mean I am not involved in all his discussions with customers.

Q. As he effected any sales to your knowledge during

this period?

MR. WEISS: It's EFF?

MR. FUZAK: EFF, understand me, you understand me, you understand me, do you not, Mr. Burg?

THE WITNESS: I do, I don't recall his having been involved directly in any sales.

BY MR. FUZAK:

Q. Now, the Plaintiff corporation does a substantial amount in terms of porportion to the total business it does of residential work, does it not?

A. There again, I would like to have you rephrase that, I'm not quite sure what the question is.

Q. Well, we earlier saw that you distinguished in your mind and in some of your answers here between residential work and commercial work, is that right?

A. That is correct.

Q. Now, I'm saying to you that the Plaintiff corporation is involved in residential work, is it not, and providing Ready-Mixed Concrete for residential work, is that correct?

A. Yes.

Q. Can you give me any idea what the porportion of your annual output of your sales is of residential work

as distinguished from the total --

MR. WEISS: May I ask what time you're speaking of?

MR. FUZAK: This year.

THE WITNESS: Well, there again I would have to check myself, but this year I would say we have had more commercial than residential work.

BY MR. FUZAK:

Q. And, over the period 1968 to through 1973, has that been somewhat different?

A. Houses was much more prevalent in the 1968 through '72 year I would say.

Q. And, would that mean that you sold more concrete to residential consumers during those periods of time than to commercial consumers?

A. That is correct, yes, yes.

Q. And, do you also have the responsibility for certain residential customers?

A. Yes.

Q. Could you give us the names of some of the larger customers that are your responsibility during this period, 1968 through -- to date make it, excuse me?

A. Well, let's see, we have -- are these customers that are still with us or customers that have left?

Q. Well, during the period?

A. During the period?

Q. Yes, just asking you to reflect for the record here some of the larger customers of that type that you've had under your charge?

A. Well, we have had CBS Concrete.

MR. WEISS: I'm sorry.

THE WITNESS: CBS Concrete, Scranfetto, Mistretta Concrete, Juliano, Crystell Concrete, and there are a host of others but I just can't, you know --

MR. FUZAK: Fine, West Seneca Concrete, would that be another one?

THE WITNESS: Yes, we have dealt with West Seneca Concrete.

BY MR. FUZAK:

Q And, Dag Construction.

MR. WEISS: What was that, D-A-G, Z-A-G?

THE WITNESS: Dag, I believe it is, D-A-G.

MR. FUZAK: D as in dog?

THE WITNESS: Yes.

MAGISTRATE MAXWELL: D as in Dag?

THE WITNESS: Dag.

MR. FUZAK: That is another customer?

THE WITNESS: Yes.

MR. FUZAK: Now over this period of time from 1968 to date, has the Plaintiff corporation offered residential customers of the type we have just discussed discounts from list prices, price discounts?

MR. WEISS: You mean --

MR. FUZAK: Reductions.

THE WITNESS: On residential construction w have stayed at the list price.

BY MR. FUZAK:

Q. There has been no occasions to your knowledge, Mr. Burg, where the Plaintiff corporation has sold Ready-Mixed Concrete to a residential customer for less than the list price and of course I'm talking about a price reduction discount?

A. You're talking from 196' back or up rather?

Q. To date, yes.

A. Honestly I don't recall any.

Q. Has the Plaintiff corporation during this period

of time afforded to residential customers this waiver of waiting time privilege?

A. There again to meet competition the answer would be yes.

Q. And, during this period of time has the Plaintiff corporation also afforded the residential customers or some of them the privilege of having no minimum trucking charge?

A. Again, I would say possibly to meet competition, there have been a case or two.

Q. And, during the cold months has -- have there been occasions where the Plaintiff corporation has not charged residential customers the heated concrete charge?

A. I do not believe any occasions in my memory that that has occurred.

Q. Now, in those answers, Mr. Burg, you said to meet competition, some of these things were done, is that right?

A. That is correct.

Q. Could you tell us who you mean by competition?

A. Well, our chief competition in our business has always been Pine Hill Concrete, there are other

competitors in the business.

Q. Yes, could you name those for me, please?

A. Clarence Ready-Mix, let's see, Stone Concrete.

Q. Stone, S-T-O-N-E?

A. Right, Bender Concrete.

Q. I'm sorry.

A. Bender, B-E-N-D-E-R.. Buyers Concrete.

Q. B-U-Y-E-R-S?

A. E-R-S, yes. Schabell.

Q. S-C-H-A-B-E-L-L Concrete?

A. Yes, and there may be some other ones, I'm missing, but as I say Pine Hill has been our chief competition.

Q. Are all of these companies that you just named union companies?

A. No.

Q. Which of them are union companies, to your knowledge?

A. That is a good question, I know that Clarence, Pine Hill, are definitely union. Some of the other ones are semi union and some are non union.

Q. Mr. Burg, am I correct that there is a difference in the wage scale between the union and the non union worker in this business and among these

companies that we just discussed here?

A. Yes, it's correct, union scale is much higher.

Q. Can you give me some indication as to how much higher?

A. Well, this is again out of my field and I don't delve into it, I would say it is probably.

MR. WEISS: Well, I object to any speculation, your Honor, he said it's out of his field.

MAGISTRATE MAXWELL: Well, if you know, Mr. Bu

MR. FUZAK: Well, he's not speculating, I don't think, your Honor, he's been in the business a long time.

MR. WEISS: It's certainly a matter of --

MAGISTRATE MAXWELL: Well, Mr. Burg, if you know for instance that a union truck driver was making more than a non union truck driver, you can so state, if you know as to any other members as opposed to non union members?

THE WITNESS: Definitely the union driver does make more money but I don't know exactly what the difference would be.

MR. FUZAK: Well, do you have any general idea, sir?

MR. WEISS: Object to that, your Honor, it's immaterial.

MAGISTRATE MAXWELL: Your objection is noted, you can answer if you are able to, Mr. Burg.

THE WITNESS: I can check this and give you the answer if you would like it, I don't want to say because I -- I would like to check it, I can give you that answer.

MR. FUZAK: I just wanted to get your best recollection and understanding now as you sit there. We can check it later, I'm not trying to hold you to it, I just want to get your best recollection now.

MR. WEISS: Your Honor, I believe his recollection could be right or wrong, but it wouldn't change the fact.

MAGISTRATE MAXWELL: Right, it's strictly a recollection if he has one.

MR. WEISS: But it wouldn't change the fact.

THE WITNESS: Well, the point is that no one knows what the non union driver is being paid and

I do not know exactly what our drivers are being paid.

MR. FUZAK: You do know that the non union drivers however, are getting something less than the union drivers?

THE WITNESS: I certainly would presume so, yes.

BY MR. FUZAK:

Q. Now, you've mentioned some of these companies that you're in competition with, are you also in competition with Niagara Concrete?

A. On a rare occasion, on a rare occasion, it would be possible that we would run into their area but not as a general rule, no.

Q. How about a company by the name of Rieffler, R-I-E-F-F-L-E-R?

A. Yes, we would be more in competition with them.

Q. And, Town Line, is that another?

A. You're mentioning all the ones I forget.

Q. I'm trying to, sir, yes.

A. Yes.

Q. And, Empire, is that another too, sir?

A. Never have we run directly into Empire that I know of.

Q. How about Riley?

A. Riley, yes.

Q. What's the name of that company, sir, do you know?

A. I believe it's Riley Ready-Mixed Concrete.

Q. To your knowledge are those companies that I've just named and we have talked about, are they union or non union?

A. Let's see, we named Town Line?

Q. Right.

A. Which is not union to my knowledge.

Q. We named Rieffler?

A. Rieffler, I don't believe he's union.

Q. Riley?

A. Riley is semi from what I understand.

Q. You mentioned that before, can I interrupt, what's that mean semi union?

A. This is my interpretation of this and I'm not positive that I'm correct, but from what I understand his drivers are union drivers. He has no engineers in his plant to load the trucks, so I would class him as being a semi union plant.

Q. I see. All right. And, these companies that you've just named here are companies with which you are

in competition and have been since 1968, those that were in existence?

A. That is correct.

Q. Now Mr. Burg, in connection with this competition and we're talking again this same period 1968 to date, have there been occasions when you have obtained jobs in competition with the non union contractors?

A. Not very often.

Q. Have there been occasions?

A. There have been occasions.

Q. Excuse me just a minute. Mr. Burg, do you know whether or not any of these companies that we have just named here as being your competitors aside from Pine Hill have their own source of gravel? We've mentioned Clarence, Clarence Ready-Mixed, am I correct that Clarence has a source of gravel through Clarence Sand and Gravel?

A. From what I understand they are buying the biggest share but they do I believe have some of their own gravel.

Q. That is Clarence?

A. That is Clarence, yes.

Q. What about the rest of these companies that we

have just named here, do you know whether or not any of those companies have their own sources of gravel?

A. I don't believe that any of them do, no sir.

Q. Do you know, sir, where they obtain their gravel?

A. There again this is a bit out of my field and I -- I would not be able to answer.

Q. Now, I asked you about these companies using gravel, do these companies that you compete with also make use of crushed stone in their production of Ready-Mixed Concrete?

A. Certainly some of them do.

Q. Your company does, does it not?

A. That is correct, yes.

Q. Do you know what the source of the gravel is which your company uses, where you get it from?

MR. WEISS: Your Honor and Mr. Fuzak both, I think Mr. Muck -- or Mr. Frey would be more competent on this and I'm sure there would be no problem.

MAGISTRATE MAXWELL: Maybe Mr. Burg knows, if he knows, he can answer, if he doesn't he can say so.

THE WITNESS: We have more than one supply and I'm not that involved in that particular end of the business so I'd rather not make a statement, I'm not positive.

MR. FUZAK: You don't know as you sit there any of the suppliers of crushed stone to your company, is that right?

MAGISTRATE MAXWELL: Is crushed stone the same as gravel?

MR. FUZAK: There is a difference.

MAGISTRATE MAXWELL: I understand you asked about gravel?

MR. FUZAK: No, we switched from gravel, I think the questions will indicate and we have been talking now I think in the last two questions about crushed stone, you understand that, don't you Mr. Burg?

THE WITNESS: I didn't understand it, but you're speaking of crushed stone.

BY MR. FUZAK:

Q. Yes, I am.

A. There are two suppliers of crushed stone, Federal Crushed --

Q. Can you tell me where they are located?

A. It's in Bellview which is in Cheektowaga and Houdaille Crushed Stone which is in Bowmansville, sounds like Houdaille but it's Houdaille.

Q. Bowmansville is a part of the Town of Lancaster?

A. I believe so, yes. There are two other crushed stone plants in the area but those are the -- I believe the biggest suppliers.

Q. Do you know whether your company gets any crushed stone from these other two companies that you just mentioned?

A. I wouldn't, I wouldn't say, we have probably purchased some at some time but --

Q. Who are the other two you make reference to?

A. County Line Stone.

Q. And, that is located where, sir?

A. County Line is off of Crittenden Road in the Town of Newstead and Pfohl Brothers which is off of Gunville Road I believe probably in the Town of Lancaster.

Q. Mr. Burg, who for your company establishes the price of a yard of concrete, who makes that decision, I'm now talking about list price?

MR. WEISS: You are talking about list price?

MR. FUZAK: Yes, I am. I'm now talking about list price.

THE WITNESS: Mr. Herbert Frey and Mrs. Muck.

BY MR. FUZAK:

Q. And, do you participate in those decisions?

A. No, I do not.

Q. Mr. Burg, do you recollect that you provided the Court in this proceeding with an affidavit which was verified by you on July 17th, 1974 in connection with Pine Hill's request for a revision of the July, 1971 order regarding prices?

A. Yes.

Q. I just want to ask you a few questions about this affidavit. I want to direct your attention, it's part of the papers of the Court, I'd like to direct your attention to paragraph ten on page three where the statement is made, I'm quoting, "Pine Hill attempted to induce over fifteen of Frey Concrete's purchasing customers to switch from Frey Concrete to Pine Hill by touting the fact that Pine Hill did not intend to raise its prices and would adhere to its August 9th, 1971 price list throughout the

1974 season." You have heard me read that and I think you read along with me, right?

A. Yes.

MR. WEISS: Can you hold on until I get that?

MR. FUZAK: Yes, sir.

MR. WEISS: Okay, sorry that you --

MR. FUZAK: It's all right, can you tell us the names of these over fifteen of Frey Concrete -- concrete purchasing customers to which you make reference in that statement?

THE WITNESS: I cannot at the present time, but I can give you -- furnish you that information. I have it -- it doesn't come to my mind right off the bat.

BY MR. FUZAK:

Q. You can't think of anyone of those more than fifteen customers that you make reference to in that affidavit?

A. Yes.

Q. Fine. Would you do that for me?

A. CBS Concrete.

Q. And, when did this occur, that Pine Hill as you state in this affidavit attempted to induce CBS

Concrete?

A. Well, we raised our prices in April of '74 and about within two or three days from the time that our prices were raised, my customers immediately contacted me and said that your chief competition is not raising its price. That he is going to adhere to his '71 -- I believe it was '71, in August of '71 price list, at least throughout 1974.

Q. Now, this is what you were told by some customer or cumstomers of yours?

MR. WEISS: No, he said this was CBS.

THE WITNESS: CBS told me this.

MR. FUZAK: Who at CBS told you that?

THE WITNESS: The gentleman's name was Tony Cioncone, C-I-O-N-C-O-N-E.

BY MR. FUZAK:

Q. And, that is the substance of what he told you?

A. Basically he said the prices for his particular concrete was not going up, subsequently I heard this from other customers throughout the housing area.

Q. Can you give me the names of some of those other customers that you heard this from?

A. Crystell Concrete.

Q. And, who at that concern told you this?

A. John Mistretta.

MR. WEISS: John?

THE WITNESS: Mistretta.

BY MR. FUZAK:

Q. And, did he tell you the same thing in substance that you just related here that CBS told you?

A. Yes, he said that a Pine Hill salesman was out and said the price, the date at quoted would be in effect at least through 1974.

Q. And, that is the substance of what you were told in that instance, is that correct?

A. That is correct.

Q. Can you think of any others?

A. William Mistretta, Mistretta.

Q. And, I'm sorry, who from -- who is that?

A. That is his name, it was Will.

Q. Who called you?

A. He contacted me and met me and saw me.

Q. All right. And, what did Mr. Mistretta tell you?

A. He said basically the same thing.

Q. The same thing as CBS Concrete said?

A. Yes. And, Crystell and Mistretta.

Q. Anybody else you can think of?

A. Louie Cervi.

Q. Now, did Mr. Cervi contact you in some way?

A. Yes.

Q. And, --

A. We discussed this.

Q. What did Mr. Cervi tell you?

A. That the price that Pine Hill had out would remain in effect through the period of 1974 at least.

Q. Anybody else you can think of?

A. Juliano Concrete.

Q. Who from there, sir?

A. Louie.

Q. Contacted you?

A. Louie Juliano.

Q. And, what did Mr. Louie Juliano say to you?

A. He said basically the same thing that he had been given to understand that Pine Hill was maintaining its price at least through 1974. Now, these people did not all contact me, I ran into them in various spots and they all managed to inform me that this was the case.

Q. That was going to be my next question, as a matter of fact. Whether or not all of these people you so far listed contacted you to inpart this advice, I understand they did not?

A. No.

Q. Do you recollect any of them specifically contacting you to give you this advice, any of these that you've named here?

A. I think one or two possibly did talk to me on the telephone and informed me.

Q. Can you think of any others, sir?

A. Dag Construction, D-A-G.

Q. And, who from there?

A. Ralph DiAugestino.

Q. And, what did Mr. DiAugestino tell you?

A. Basically the same thing.

Q. Do you remember any others, sir?

A. There were others that did not -- that talked to my salesman, Mr. Kushman.

Q. Mr. Kushman and he reported back to you, is that correct?

A. Yes, that is correct.

Q. Was the statement by these others essentially the

same that you've counted here?

A. That was basically what they said, yes.

Q. Okay. Now, were you in April, 1974 providing any Ready-Mixed Concrete to CBS Concrete?

A. I believe so, there again I would have to check my books in order to be accurate, but we did provide a great share, in fact, CBS was one of our biggest wall customers.

Q. Do you recollect that in the fall of 1973 and for sometime thereafter CBS Concrete did not buy Ready-Mixed Concrete from your corporation?

A. I'd have to check, but I believe they were buying some at that time.

Q. Was CBS one of your customers?

A. Yes, I dealt with them.

Q. Do you have any recollection that they discontinued buying concrete from your corporation in the fall of 1973 because they were having difficulty finishing it?

A. They did stop buying some flat work at that time.

Q. What's that mean, flat work?

A. Well, the term flat work means slabs, driveways, and so forth.

Q. Well, you used Ready-Mixed Concrete for that, right?

A. That is correct.

Q. And, they did stop buying Ready-Mixed Concrete from your corporation?

A. For a time they were buying periodically, yes.

Q. Let me get into that, am I correct in the fall of 1973, CBS Concrete discontinued for some period of time buying Ready-Mixed Concrete from you because they were having difficulty finishing it?

MR. WEISS: I object to that, your Honor, he said for a period for flat work.

MAGISTRATE MAXWELL: He can answer the question if he is able to, the objection is noted.

THE WITNESS: They bought some flat work during that period, I'm quite sure, but they did buy some from other sources, that is correct.

BY MR. FUZAK:

Q. You were aware, were you not they were not buying from you because they were having difficulty during that period of time in finishing the concrete that you were providing them?

A. There was a problem involved, I don't know all of the

details, but there was a problem for a few days or weeks.

Q. Now, this is your customer, how long a period of time did this persist through that they did not buy from you because of this difficulty of finishing?

A. I would have to check that out, I couldn't tell you.

Q. You have no recollection?

A. No, I couldn't break it down into days or weeks.

Q. Excuse me a minute, your Honor.

MAGISTRATE MAXWELL: Sure.

MR. FUZAK: Looking still at that same affidavit of Mr. Burg, the one that you verified on July 17th, 1974 and in paragraph eleven on page four, let me read this first sentence and you look over my shoulder if you will, "Deponent has been informed that a Frey Concrete customer who desires to remain anonymous was approached by Sam Prezioso, salesman for Pine Hill and informed he should not continue to do business with Frey because Pine Hill would sell him concrete at the August 9th, 1971 price." Now, can you

tell us where you received that information and --

THE WITNESS: This information came through Mr. Kushman.

MR. FUZAK: Mr. Kushman told it to you?

THE WITNESS: Right.

MR. FUZAK: And, who was the customer who in your affidavit desired to remain anonymous?

MR. WEISS: I object to that, if the customer wants to remain anonymous.

MR. FUZAK: If your Honor please, this is a --

MAGISTRATE MAXWELL: I think your objection is going to be noted, Mr. Weiss, but as I understand this was one of the allegations made in a particular affidavit, one of the basis and one of the grounds of this action, as I understand it is it competition or is restraintive competition.

MR. FUZAK: That is right.

MAGISTRATE MAXWELL: You can answer if you are able to, Mr. Burg.

THE WITNESS: I believe the gentleman is named -- it was the name of the company which is

MDI.

MR. WEISS: MGI?

THE WITNESS: MDI.

MR. FUZAK: M as in Mary?

THE WITNESS: Right.

MR. FUZAK: D as in dog?

THE WITNESS: Right.

MR. FUZAK: I as in island?

THE WITNESS: Right.

BY MR. FUZAK:

Q. MDI Company. What was the name of the gentleman who communicated this information?

A. The gentleman's name I believe is Marino Ianucci, I-A-N-U-C-C-I, I believe.

MAGISTRATE MAXWELL: Marino or Mariano?

THE WITNESS: I was told it was Marino, I do not know the gentleman.

MR. FUZAK: Mr. Burg, to your knowledge has your company during 1974 at any time sold wall concrete at a net cost to the customer of twenty-two dollars a yard or less?

THE WITNESS: Our wall concrete I believe was raised on August -- I mean April of 1974 to twenty-

three dollars and seventy cents.

BY MR. FUZAK:

Q. Yes. Now, that is fine, but the answer to my question is what?

A. Would you repeat it again?

Q. Yes, my question is at any time during 1974 has your company sold wall concrete at a net cost to the purchaser of twenty-two dollars per yard or less than twenty-two dollars per yard when you take into account any discount or wai- ing waiting time or anything of these other things we have been talking about?

A. Our price for concrete from up to this April increase was twenty-two dollars per yard.

Q. All right. Let me correct the question. You're perfectly right to stat that. After April 1, 1974, was there any occasion where your company sold wa'l concrete at a net cost to the customer of twenty-two dollars per yard or less?

A. No, we are now selling wall concrete for twenty-three dollars and seventy cents per yard.

Q. And, do you -- have you not provided any price discounts to any customer since April 1, 1974 from

that twenty-three dollars and seventy cents price?

A. Well, there again we have our fifty cent discount.

Q. All right. Aside from the prompt payment discount, are you testifying that at no time has the Plaintiff corporation sold wall concrete for a price less than twenty-three dollars and seventy cents?

A. That is correct. We have not sold wall concrete for less than twenty-three-seventy since April.

Q. Are you testifying, sir, that there have been no occasions since April 1, 1974 that the Plaintiff corporation did not offer a waiver of waiting time or a waiver of the minimum trucking charge or any other kind of reduction in the net cost of the product to any particular customer, below the twenty-three dollars and seventy cents?

A. You're speaking of wall customers now?

Q. Yes.

A. The matter of waiting time and small load charges with wall customers does not come up as a rule. In other words, we sell our wall concrete to our wall men at twenty-three dollars and seventy cents and we had maintained that since April, although we have lost some wall business.

Q. Now, is it your testimony that the Plaintiff corporation has not engaged in any practice since April 1, 1974 which have the result and the effect of providing the particular customer with wall concrete at less than twenty-three dollars and seventy cents per yard excluding the prompt payment discount?

A. Not to my knowledge.

Q. Does the Plaintiff corporation, Mr. Burg, have any customers under contract requiring those customers to obtain their Ready-Mixed Concrete for all their work from Frey?

MR. WEISS: I'm sorry, I didn't -- could you read it?

THE WITNESS: Would you want to -- I didn't quite understand that.

MR. FU AK: All right. Let me see if I can rephrase it. Does your company have any contracts with any customers pursuant to which those customers or that customer are required to obtain all of their Ready-Mixed requirements from Frey Concrete?

THE WITNESS: Are we speaking of wall customers, now?

BY MR. FUZAK:

Q. Any customers?

A. Any customers. Well, each job is an individual job. And as a rule a purchase order is issued and we deliver the amount of yards that the purchase order calls for. So I suppose that would be called a contract.

Q. That is for a particular job, however?

A. A particular job.

Q. All right. But what I'm asking about is whether you have any kind of contracts with any customers pursuant to which you agree to provide those customers and they agree to take from you all of their requirements during a specified period of time, say a year of Ready-Mixed Concrete?

A. I'm sorry, I don't think we do, not to my knowledge, I'd like about ten or twelve like that.

Q. I'm sure everybody would. That is what I thought. Now, is it a fact of your business that these various customers for Ready-Mixed Concrete transfer their purchasing from one Ready-Mixed Concrete company to another depending on price and other items?

MR. WEISS: You mean from time to time?

MR. FUZAK: From time to time.

THE WITNESS: Well, this has been the case in the last few years, yes.

MR. FUZAK: Yes.

THE WITNESS: If I may say that the reason has been that the market has been very competitive and people have been more active in selling than giving away and so forth.

BY MR. FUZAK:

Q. Excuse me a minute please. Mr. Burg, during this year 1974, have there been occasions when your company has filed bids in a competitive bidding situation for a commercial job and has obtained that job and where Pine Hill has also filed a bid?

A. I'm sure there has been, yes.

Q. Can you give me any examples of situations where that has occurred, where you have bid on a commercial job and Pine Hill has bid on a commercial job and you have been awarded the job?

A. Well, the problem is I'm not sure how many jobs Pine Hill has bid on, but I'm sure that some of the jobs that we have quoted, they have quoted also.

Q. And, some of those jobs you've been awarded?

A. There have been some, yes.

MR. WEISS: I might say for the record, your Honor, after we have our discovery we'll be better able to answer that question.

MR. FUZAK: If I can maybe have about five minutes it might be that I can conclude with Mr. Burg, if I can look through my notes and so on to facilitate the examination.

MAGISTRATE MAXWELL: Sure, call me when you're ready.

(Whereupon, at 4:35 P.M. a short recess was then taken.)

(Whereupon, the proceedings reconvened at 4:45 P.M.)

MAGISTRATE MAXWELL: Are you ready to continue, Mr. Fuzak?

MR. FUZAK: Yes, sir.

MAGISTRATE MAXWELL: May I remind you, Mr. Burg, you're still under oath.

THE WITNESS: Yes, sir.

CONTINUED EXAMINATION BY MR. FUZAK:

Q. Mr. Burg, is the Higgins job on the Skyway a recent job in which both Pine Hill and your company bid and your company got the work?

A. Yes.

Q. Can you tell us how much Ready-Mixed Concrete is involved in that particular job?

A. I think there is nine or ten thousand yards, I'm not positive, but that is about it.

Q. Now, during the period 1968 to date, have you on behalf of the Plaintiff corporation here attempted to get work that Pine Hill has also been interested in getting?

A. Oh yes.

Q. And, have you in doing that, have you offered to some customers price discounts or other methods of reducing the net cost of the product to the customer?

A. I would say again we have met competition.

Q. Have there been no occasions where you have initiated such suggestions with customers during this period?

A. We have not gone out and initiated price considerations no.

Q. Is it your testimony, Mr. Burg, that on no occasion from 1968 to date have you personally ever gone

out on behalf of the Plaintiff corporation here and attempted to get business from a customer by first telling that customer before Pine Hill or anyone else that you would provide them a product at less than your list product, list price?

A. Oh, no.

Q. You've never done that, sir?

A. No. The list price has not been in effect in our business for the -- in commercial individual jobs, the list price has not been in effect for quite some time.

Q. What's that mean, quite some time?

A. Well, frankly from about 1968, '69.

Q. Are you saying that you have a list price but that you don't use it?

A. I'm saying that we, in order to gain some business have not used the list price.

Q. Well, a minute ago the last question you said that the list price has not been in effect with respect to commercial business since at least 1968 or 1969, is that correct?

A. I'd say that is basically true.

Q. And, by the list price, you're talking about the

Plaintiff corporation's list price, your list price?

A. That is correct.

Q. So are you saying then that you take each one of these commercial jobs that you propose to provide Ready-Mixed Concrete for and you handle it on a separate job by job basis and make the best deal that you can in effect?

A. This is true on commercial work.

Q. Now, are you familiar with the work that your company is doing with reference to Buffalo Gravel Company jobs?

A. Yes, I would say there are some Buffalo Gravel jobs.

Q. Is it a fact -- I'm sorry.

A. That we are doing, we are doing some of the Buffalo Gravel, Buffalo Slag Company jobs.

Q. That is the proper name, Buffalo Slag?

A. I believe that was their proper name, yes, sir.

Q. Am I correct that Buffalo Slag Company discontinued the Buffalo Ready-Mixed Concrete business here some months ago?

A. That is correct.

Q. When was that, do you remember?

A. I believe it was around June, the middle of June, sometime in that period, that they discontinued the Ready-Mixed operation.

Q. And, did you or anyone from your knowledge, from your company have any conversations or discussions with representatives of Buffalo Slag Company concerning the taking over and finishing of certain jobs that were then in process for that company?

A. On some of the jobs we did take over and finished some of their work.

Q. All right. How did that come about?

A. Well, it's my understanding that at that time we were using a considerable amount of their crushed stone. This is what I was told and I assumed that they were probably interested in selling us crushed stone.

Q. In other words, at that time your company was using a considerable amount of crushed stone with reference to its production of Ready-Mixed Concrete?

A. That is correct, yes.

Q. All right. Now, were you -- do you know whether or not the arrangement between your company and

Buffalo Slag Company involves your taking over some or all of these jobs and agreeing to buy crushed stone from Buffalo Slag Company?

A. No, I don't believe we took over all of the Buffalo Slag jobs.

Q. Can you tell me what you know about that subject, how it came about that your company is doing some of these Buffalo Slag Compamy jobs?

A. Well, it's conjecture on my part.

MR. WEISS: Well, I object to it, your Honor.

MAGISTRATE MAXWELL: Well, if you know anything about it, Mr. Burg, you can testify as to it, but conjecture is something we're really not interested in.

THE WITNESS: Well, some of those customers had done business with us prior to this and I assume naturally they came back and wanted to do more business with us.

BY MR. FUZAK:

Q. That is an assumption on your part?

A. That is correct.

Q. Let me ask you some specific questions. Have you been engaged in any conversations or discussions with

any representatives of Buffalo Slag Company with reference to the Plaintiff corporation taking over any of these jobs, you personally, I'm talking about?

A. I have discussed some of the jobs to find out details about them with some representatives.

Q. Of Buffalo Slag Company?

A. Of the Slag Corporation.

Q. Which representatives were those, what names, please?

MR. WEISS: Well, I object -- the question -- I think you asked him if he had a discussion relative to taking them over and said he had some discussions relative to the details of the job, if it's the same thing I certainly have no objection. I don't know if you are talking about the same thing.

MR. FUZAK: I don't know, he answered the question, I'm just asking.

MAGISTRATE MAXWELL: If you want to clarify that, I think Mr. Fuzak is asking about discussions relative to your taking them over, you may have answered about that or about what was to be done after they were taken over.

THE WITNESS: My answer --

MAGISTRATE MAXWELL: If you can clarify it.

THE WITNESS: Yes, sir. My answer was that some of the details of the jobs I discussed with some of their representatives, in other words, I would discuss how much was involved and what the mix was and things like that, asking for my information to further our particular job and incidentally, to further our business rather, incidentally, some of these people would call and ask us to help them out.

BY MR. FUZAK:

Q. Well, these discussions that you just talked about that you had with representatives of Buffalo Slag, they were had by you, am I correct, for the purpose of attempting to get for your company that work on those jobs?

A. I was attempting to get information, yes, so that I could satisfy these particular jobs.

Q. Well, were these discussions that you're talking about had by you before or after the time that your company took the jobs over?

A. Well, Buffalo Slag -- if I may answer this.
Q. Fine.
A. Buffalo Slag had a strike take place, and when the strike took place, I was contacted by some of the people who had jobs with them asking --
MR. WEISS: Wait a second, you said some of the people had jobs with them. I don't think we know who you're talking about?
MAGISTRATE MAXWELL: Some of Buffalo Slag customers?
THE WITNESS: Some of Buffalo Slag customers called us and said they're out of business, we need help. Therefore, can you help us out? So I naturally discussed the details as much as I could to try to satisfy their customers with the idea that this was on a strike situation and ultimately it ended up their going out of business.
MR. FUZAK: Well, my question is whether or not you had any discussions with representatives of Buffalo Slag Company leading to arrangements between your company and Buffalo Slag Company whereby your company took over jobs that were not finished that were being done

by Buffalo Slag Company?

THE WITNESS: Well, the first approaches were made -- pardon me, at the time of the strike, when they went out of business we followed up trying to find out other details about the jobs that we had that were formerly Buffalo Slag jobs.

BY MR. FUZAK:

Q. You followed up with whom?

A. With representatives of Buffalo Slag Company, of Buffalo Slag to find out details and so forth.

Q. Do you know whether or not your corporation made any arrangements or agreements of any kind with Buffalo Slag Company with reference to taking over these jobs?

A. There were some small -- some jobs that were discussed, I wouldn't be able to go into detail about them at this time.

Q. Why is that, because you can't recollect them or for some other reason?

A. There were little ones here and there that had different mixes involved and so forth.

Q. Well, how many jobs that Buffalo Slag Company was

doing prior to the time that it discontinued business did your company pick up and finish?

A. I can find that, I can count those up, the ones we became involved in. I couldn't give you a number right off the top of my hat.

Q. Do you have any judgment on that as you sit there?

A. At least four or five or six, possibly.

Q. Now, to your knowledge did you obtain those jobs through some kind of an agreement between your company and Buffalo Slag Company?

A. Most of the contacts were made directly to me asking me to service these jobs which those people had.

Q. But that doesn't answer my question. My question is whether or not to your knowledge there was any agreement, whether orally or written between your company and Buffalo Slag Company pursuant to which you took over these jobs?

A. I think there was a case, for instance, a Thruway job or something in that area where we finished up their job.

Q. And, under what arrangements with Buffalo Slag Company?

A. Through Buffalo Slag.

Q. Tell me about that, how did that work?

A. I really don't know the details.

Q. Who handled that, the arrangements for that?

A. Well, Mr. Frey and I -- and I don't know who exactly from Buffalo Slag.

Q. Did you have any conversations with Mr. Frey concerning what the arrangements were with reference to taking that Thruway job over?

A. Well, this particular job I believe had to be -- no, I don't recall the details, I think I might have mentioned it to her, I'm not sure, he must have been involved in these.

Q. Have you had any conversations with any representatives of your company, whether Mr. Herbert Frey or Mrs. Lois Muck or anybody else with respect to any kind of contract or agreement between your company and Buffalo Slag Company relating to the taking over of these jobs by your company?

A. Well, we discussed the work, but I have not to my knowledge, been on any -- been in on any contract --

Q. What were the terms that you took over these jobs under?

A. This one particular job that comes to mind was a

job that was a Thruway job, I mean it was patching a Thruway, a couple hundred yards or something like that. And, I believe they undertook the billing or something. I don't really know the details on it.

Q. Who would know that from your company?

A. Well, Herbert Frey.

Q. Mr. Burg, with reference to the commercial jobs that the Plaintiff corporation has done within the year 1974, for example, is the type of aggregate to be put into the cement specified in the order that your company specifies? That is, is it specified that a certain aggregate such as gravel, crushed stone, hydite or some other aggregate be used?

A. Well, this would depend on the specifications, in some cases it may be and in some cases it isn't, I mean, depending upon the specs written by the architect.

Q. Based on your experience, is it a fact that in most cases the aggregate is not specified?

A. I wouldn't say that, no.

Q. What would you say about that subject?

A. They usually -- the specifications have a choice

of maybe one or two aggregates.

Q. Such as what?

A. Gravel or crushed stone.

Q. I see.

A. However, meeting certain specifications.

Q. You mean the aggregate themselves, whether it be gravel or crushed stone?

A. It would have to meet certain specifications.

Q. Would have to meet certain specifications?

A. That is correct.

Q. One thing I wanted to clarify that I think I may be a little confused on, Mr. Burg, we had some conversation earlier with reference to some statement in this affidavit of yours of July 14th, 1974, and we were talking about your April 1, 1974 wall concrete price of twenty-three dollars and seventy cents, do you remember that?

A. Yes.

Q. All right. Now, can you tell us what kind of concrete that is that the twenty-three dollar and seventy cent price per yard relates to, is it five bag mix, is it some other kind of mix?

A. Well, it's gravel concrete and about a four and a

half bag, in that area, I believe twenty-five hundred is standard wall mix.

Q. What does that mean, twenty-five hundred?

A. Twenty-five hundred pounds per square inch.

Q. Total of everything that is in the concrete, you mean?

A. Well, concrete is based upon strength.

Q. All right.

A. In order to obtain the strength most specifications call for a certain pre-described strength per square inch.

Q. All right.

A. And, what I'm saying is that this wall concrete is usually deemed to be twenty-five hundred pounds under a compression test.

Q. Per square inch?

A. Per square inch.

Q. And, that is what the twenty-three dollars and seventy cents price relates to?

A. Yes, sir.

Q. And, that would be a four and a half bag mix?

A. Well, in that area, yes.

MR. FUZAK: Okay. Your Honor, I would conclude with

Mr. Burg at this point.

MAGISTRATE MAXWELL: Fine. Do you have any questions you want to put on for the record, Mr. Weiss?

MR. WEISS: No.

MAGISTRATE MAXWELL: Mr. Burg, thank you very much. You're excused.

THE WITNESS: Thank you.

MAGISTRATE MAXWELL: Your deposition is complete. It's my understanding then that the Defendant would like to continue with the examination of Mrs. Muck and Mr. Frey.

MR. WEISS: Your Honor, we wrote a letter to your Honor and a copy to Mr. Fuzak and Mr. Manz, Mrs. Frey had a heart attack, she's recovering. We are not asking at this time that her deposition not be taken. We believe that if her rate of recovery continues, you'll be able to depose some time after the first of the year.

MAGISTRATE MAXWELL: Why don't we defer any discussions on that until we have completed the testimony of Mrs. Muck and Mr. Frey?

MR. WEISS: All right.

MAGISTRATE MAXWELL: I'd like to schedule that for tomorrow?

MR. WEISS: Well, your Honor, this is -- I certainly am not in a position to ask any deferals, but that telephone call which I received in there asked if I could be in Philadelphia tomorrow.

MAGISTRATE MAXWELL: Who is asking, Mr. Weiss?

MR. WEISS: Pardon me?

MAGISTRATE MAXWELL: Who's asking?

MR. WEISS: Pardon me?

MAGISTRATE MAXWELL: Who is asking?

MR. WEISS: Well, it's a Pennsylvania State official that has asked for a meeting in Philadelphia tomorrow, Mr. McCord is his name and it's at six o'clock tomorrow, but --

MAGISTRATE MAXWELL: What time does your plane leave?

MR. WEISS: I don't know, I haven't had a chance to check the schedule but it would require some preparation.

MAGISTRATE MAXWELL: Is he asking or is it something of a necessity. Look, you got to appreciate

and I'm certain you appreciate the problems we have had in this case over the last four years. I don't want to unduly restrict you in carrying on all your other necessary business but is it something you feel you can reasonably adjourn?

MR. WEISS: Well, I don't think so, but here's what I say, I'm available all day Thursday and Mr. Frey and Mrs. Muck are available, I assume, you're available all day Thursday? They have until the end of the following week and I check my schedule at the office, except for Monday, I think it's Monday morning I've available all next week and I assume they are also. So I think --

MAGISTRATE MAXWELL: Next week involves Thanksgiving, you appreciate that?

MR. WEISS: Yes, Monday is the --

MAGISTRATE MAXWELL: What's your situation on Thursday, Mr. Fuzak?

MR. FUZAK: I'll make myself available.

MAGISTRATE MAXWELL: What do you say we start at twelve-thirty on Thursday?

MR. WEISS: Okay.

MAGISTRATE MAXWELL: I don't know how extensive the examination of Mr. Frey or Mrs. Muck is going to be, I realize there have been previous depositions taken of them and I'll be hopeful it will be just tieing up loose ends and maybe they will be short, hopefully.

MR. WEISS: Is twelve-thirty good or could one o'clock be all right?

MAGISTRATE MAXWELL: One o'clock is all right, but if we can do it I'd like to get rid of both of the people in the same day.

MR. WEISS: All right, we could do it in the morning.

MAGISTRATE MAXWELL: I can't, I have other commitments in the morning, let's plan on twelve-thirty.

MR. WEISS: It would be a great convenience to me and Pennsylvania would be happy.

MAGISTRATE MAXWELL: Tell Pennsylvania we'll defer to them this time.

MR. WEISS: Benefit the commonwealth.

MAGISTRATE MAXWELL: Twelve-thirty Thursday, November 21st, continuation of the deposition and

hopefully the conclusion of the depositions.

* * * * *

626-629 Liberty Bank Bldg.
Buffalo, N. Y. 14202
853-5600

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY, READY-MIXED CONCRETE, INC., et al,

Plaintiffs,

-vs-

PINE HILL CONCRETE MIX CORPORATION, et al,

Defendants.

Proceedings taken before the HONORABLE EDMUND F. MAXWELL, taken pursuant to notice at United States Courthouse Building, Buffalo, New York, taken on November 21st, 1974, commencing at 12:50 P.M.

APPEARANCES: RAICHLE, BANNING, WEISS & HALPERN,
By ARNOLD WEISS, ESQ.,
10 Lafayette Square,
Buffalo, New York,
Appearing for the Plaintiffs.

STATEMENTS
EXAMINATIONS BEFORE TRIAL
DEPOSITIONS
CONFERENCES
CONVENTIONS
ARBITRATIONS

ARNOLD WEISS
10 Lafayette Square
Buffalo, New York 14203

Jack W. Hunt C. S. R.
OFFICIAL SUPREME COURT REPORTER
& Associates

CERTIFIED SHORTHAND REPORTER
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HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR,
By VICTOR T. FUZAK, ESQ.,
1800 One M & T Plaza,
Buffalo, New York,
Appearing for the Defendants.

MANZ, MANZ & DIVIAK,
By VICTOR E. MANZ, ESQ.,
425 Statler Hilton Hotel,
Buffalo, New York,
Appearing for the Defendants.

PRESENT: SANTO VITRANO, Reporter.

MAGISTRATE MAXWELL: Okay. Mr. Fuzak?

MR. FUZAK: Yes, sir.

MAGISTRATE MAXWELL: Ready to call your next witness?

MR. FUZAK: Yes. Mrs. Muck, please.

MAGISTRATE MAXWELL: Mrs. Muck, although you may have been previously sworn in other depositions, I'll ask you to put your right hand on the Bible and raise your left hand.

L O I S A U D R E Y M U C K, after being duly called and sworn, testified as follows:

MAGISTRATE MAXWELL: Give your full name, please?

THE WITNESS: Lois Audrey Muck, M-U-C-K.

MAGISTRATE MAXWELL: If you would speak up so that everybody in the Courtroom can hear you?

* * *

included in the whole picture.

MR. FUZAK: Who was they, please?

THE WITNESS: Pfohl Brothers.

MR. FUZAK: Okay.

MAGISTRATE MAXWELL: Let me ask you a question, Mrs. Muck.

THE WITNESS: Yes. I figured that when he was asking it, he was setting one here and setting one here.

MAGISTRATE MAXWELL: Setting one what?

THE WITNESS: Prices for --

MAGISTRATE MAXWELL: All right. Let me ask you this question.

THE WITNESS: Yes.

MAGISTRATE MAXWELL: The contract as I understand it makes reference to prevailing prices?

THE WITNESS: Right.

MAGISTRATE MAXWELL: Now is it, as I understand Mr. Fuzak's question, was it the intent or the position of the corporation that the word prevailing pit prices refer to prices throughout the whole Buffalo area or only the prevailing pit prices at the Peppermint

Road Plant?

THE WITNESS: Throughout the area.

MAGISTRATE MAXWELL: Is that the question?

MR. FUZAK: Yes, thank you very much.

MAGISTRATE MAXWELL: All right.

MR. FUZAK: Thank you. Mrs. Muck, in paragraph twenty-nine of the Plaintiff corporation's complaint in this action, it's alleged on behalf of the Plaintiff corporation that the various actions set forth in the complaint have caused injury to the Plaintiffs in their business in an amount of not less than two hundred and fifty thousand dollars. Can you tell us how that figure was arrived at, who compiled that figure, ma'am?

MR. WEISS: Your Honor, I submit that the pleadings, complaint and action in Federal Court which is based on notice pleading, and which intended to be furthered is not subject for this inquiry of a witness such as this. Now, the damage -- the normal procedure in Federal Court is to furnish damage computations, these are prepared by the attorneys and

experts and not by lay witnesses and we would be happy to, as we previously told Mr. Fuzak and Mr. McDonough, we are working on a damage computation and we told them that we'll furnish them with a complete and competent damage computation and brought up to date, not to the date of the complaint which is filed, years ago, but right down to date. We'll have a detail damage computation.

MAGISTRATE MAXWELL: Can you make any itemization, Mrs. Muck, as to how that figure is arrived at?

MR. WEISS: I object to that, your Honor.

MAGISTRATE MAXWELL: All right, your objection is noted.

THE WITNESS: I will let Mr. Weiss answer that.

MAGISTRATE MAXWELL: I will let you answer the question, can you make a determination or was there any determination made by you, I'm not interested at this particular moment of the legal aspect of damages, I'm wondering and asking and I believe Mr. Fuzak's

question is do you concur in the figure that -- as far as you know, that the two hundred and fifty thousand dollar damage --

MR. WEISS: I object to that your Honor and instruct the witness not to answer that.

MAGISTRATE MAXWELL: The witness is going to answer the question, if she's unable to answer the question, she can so state. If she has a way of arriving at that figure, I think she can so state.

MR. WEISS: Your Honor, I think it's grossly unfair to the witness.

MAGISTRATE MAXWELL: It may well be as far as you're concerned if she's able to answer the question, she can answer it.

THE WITNESS: No, I'm not able to give you an answer.

MAGISTRATE MAXWELL: Ask Mr. Fuzak's question again and then you can answer it at that time.

THE WITNESS: All right.

(Whereupon, the above-requested testimony was then read back by the reporter.)

MR. WEISS: I object to the question, your Honor.

MAGISTRATE MAXWELL: Objection is noted, can you answer the question?

MR. WEISS: It says not less than two hundred and fifty thousand, the --

MAGISTRATE MAXWELL: Can you answer the question, Mrs. Muck?

THE WITNESS: No, I'm not able to answer it at this time.

MR. FUZAK: You don't know who compiled that figure of two hundred and fifty thousand dollars?

MR. WEISS: Your Honor, that calls for attorney-client --

MAGISTRATE MAXWELL: She hasn't said an attorney compiled the figure, you can answer the question.

MR. WEISS: To the extent it does, I object to it, I can assure the Court it's a lot more than that.

MAGISTRATE MAXWELL: Your objection is noted. Will you answer the question, please Mrs. Muck?

THE WITNESS: I would like it rephrased or asked over.

MR. FUZAK: Yes. Do you know who compiled that

figure of two hundred and fifty thousand dollars?

THE WITNESS: I'm not able to answer that question now.

MR. WEISS: That answers the question.

MR. FUZAK: Just a moment. Don't interrupt the witness, please Mr. Weiss.

MAGISTRATE MAXWELL: Have you finished your answer, Mrs. Muck?

THE WITNESS: Yes.

MAGISTRATE MAXWELL: Go ahead, Mr. Fuzak.

MR. FUZAK: You don't know who compiled the figure of two hundred and fifty thousand dollars, is that it?

THE WITNESS: That is what I said.

MR. FUZAK: No, well, that is all right, fine, you answered it.

MAGISTRATE MAXWELL: That is what she said.

MR. FUZAK: Do you know whether or not any officer on behalf of either of the Plaintiff corporations or any of the Plaintiffs here did any analysis before this suit was started to determine the amount of damages that is

claimed in that paragraph twenty-nine?

MR. WEISS: I object to the question insofar as it relates to paragraph twenty-nine, your Honor, if he is --

MAGISTRATE MAXWELL: Your objection is noted.

MR. WEISS: If he's asking and I suggest --

MAGISTRATE MAXWELL: I'm not interested in what you think he might be asking, if the witness can answer the question, she can answer the question and your objection is noted.

MR. WEISS: The damages we're going into on previous depositions, I have here seven volumes of depositions --

MR. FUZAK: Your Honor, we never got an answer.

MAGISTRATE MAXWELL: I'll allow her to answer the question.

THE WITNESS: Could you read the question back now?

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: We have rendered an invoice at one time to find out as the costs were progressing along, but I don't think that represents the total cost.

MR. FUZAK: Would you answer my question, please?
THE WITNESS: I'm trying to.
MAGISTRATE MAXWELL: Was an analysis made before the suit was instituted by any officer of the corporation as to what your claimed damages were, Mrs. Muck?
MR. WEISS: I object to this and consider it highly irregular.
THE WITNESS: Not a complete analysis, no.
MAGISTRATE MAXWELL: All right. Go ahead, Mr. Fuzak.
MR. FUZAK: Mrs. Muck, do you know what damages these alleged injuries that you recited in your complaint are with respect to each of the -- what amount of damages are associated with respect to each of these injuries that you've alleged in your complaint.
MR. WEISS: You want it in dollars and cents, too?
MR. FUZAK: Both.
MR. WEISS: This is the direct result of where he's going.
MR. FUZAK: The direct result if I may say --
MAGISTRATE MAXWELL: Gentlemen, I'm not interested in commentary by counsel, I'm interested in

questions and answers.

MR. WEISS: I object to this, your Honor.

MAGISTRATE MAXWELL: Your objection is noted.

MR. WEISS: Your Honor, I suggest that the Defendant request a damage computation, we'll furnish it to him.

MAGISTRATE MAXWELL: I think that the inquiry can be made of a Plaintiff as to what their damages are and how they came to arrive at them. And, I don't think it's objectionable and Mr. Weiss, I think that we're delaying things. You can figure out any type of an analysis you want at a later date but I think it's a proper question and the questions will be asked and answered.

MR. WEISS: May I ask this of your Honor, would you allow the witness time to prepare an answer to the question?

MAGISTRATE MAXWELL: The witness will also be allowed time to change anything she wants to change. They're asking for her present recollection as to what those damages may have been claimed to have been?

THE WITNESS: I'm not able to give dollars and cents figures now, I don't have any in front of me to give dollar and cents figures.

MR. FUZAK: Did you have anything in front of you, Mrs. Muck to give you dollars and cents to come up with a two hundred and fifty thousand dollar total prior to the time that this lawsuit was started.

MR. WEISS: Object to the question, your Honor.

MAGISTRATE MAXWELL: Objection is noted.

MR. WEISS: There is no jurisdiction or requirement in this Court for dollars --

MAGISTRATE MAXWELL: Mr. Weiss, you and I and counsel all know that you do not have to note an objection every time that you don't like the question. Now please refrain from making objections as to questions because those questions can properly be made. If there is any attempt to use this testimony on trial and I know there is no jurisdiction or requirement that you set out the amounts, but at some day if you're successful, you're going to get an amount and I think the

Defendant is entitled to inquire as to how you're going to arrive at the figures at some later time, please answer the question, Mrs. Muck.

THE WITNESS: I'm going to have to ask for the question again?

MAGISTRATE MAXWELL: I appreciate your problem, Mrs. Muck. Please read the question again.

(Whereupon, the above-requested testimony was then read back by the reporter.)

MR. WEISS: Objection again, your Honor.

MAGISTRATE MAXWELL: Well, we're going to have problems, Mr. Weiss, I don't want to really have to have them, I think we just finished our colloquy as to the fact, you don't need to make objections.

THE WITNESS: For me to answer this at the time when the complaint was drawn up, we had some figures in front of us. But for me to specifically say right now what that was, I can't tell you now because I am just not able to answer this right off the top of my head.

MR. FUZAK: Now when you say we have some figures in front of us, do you mean you and Mr. Herbert Frey or whom?

THE WITNESS: I think it was -- it was Mr. Frey and myself and Mr. Weiss was there.

BY MR. FUZAK:

Q. And, did you come up at that time or any time prior to the time that this action was instituted with a computation showing elements of damages and amounts that totaled two hundred and fifty thousand dollars?

A. Not a specific -- you're speaking like a bill? Is that the idea?

Q. No, I'm speaking like any kind of a computation on a piece of paper?

A. I'd like to have the question over again, please?

MR. FUZAK: Fine, if you would, please.

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: I'd like the one just before that.

MAGISTRATE MAXWELL: I think there was one back before that one.

MR. WEISS: Your Honor, I'd like to say to you respectfully now an additional grounds and

that is the work product of an attorney, the materials prepared in contemplation of litigation, the materials prepared in drawing a complaint are definitely privileged and I think the Federal rules specifically exempt them.

MAGISTRATE MAXWELL: I don't see where a computation made by officers of the corporation of specifics which might result in a figure of two hundred and fifty thousand dollars or more which is set out in the complaint becomes work product or anything else and Mrs. Muck can answer the question.

MR. WEISS: I think, your Honor, she did say it was something that was discussed at a meeting with herself and the attorney and that is --

MAGISTRATE MAXWELL: I appreciate that and I have to assume, Mr. Weiss that the figure as to what the damages are is not meant to be a confidential communication when you set out the total of that damage or a partial of that damage in the complaint, your objection

is noted, would you read that question again, please?

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: At the time we talked with Mr. Weiss we had related to him some of our costs, and certainly I don't think two hundred and fifty thousand dollars will cover it now, and I can't recall exactly what this here figure we -- when we were talking about, the two hundred and fifty seemed to be practical at the time.

MR. FUZAK: May I have the question re-read to the witness and ask for an answer to my question, please?

MAGISTRATE MAXWELL: I think she's answered it as well as she can, at least that is my understanding of the question that was presented, Mr. Fuzak, so continue your questioning.

MR. FUZAK: Mrs. Muck, was there any paper on which was placed figures relating to alleged injuries, the total of which was two hundred

and fifty thousand dollars that you're aware of before this action was commenced?

MR. WEISS: Other than by her attorney, your Honor.

MR. FUZAK: No, any.

MR. WEISS: Well, I object to that.

MAGISTRATE MAXWELL: You can answer the question.

MR. WEISS: I will object to any question relating to what I placed on the paper.

MAGISTRATE MAXWELL: She can answer the question as to whether there were entries made on a piece of paper or not, she can answer it yes or no.

THE WITNESS: You lost me.

MR. FUZAK: I'm sorry, I do think you ought to read the question over again.

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: I would have to assume there were some figures placed on the piece of paper, however, I cannot recall where this piece of paper would be and I can't recall who placed them on the piece of paper.

MR. FUZAK: Are you stating that you have seen such

a computation?

MR. WEISS: I object to that, your Honor, she's answered the question.

MR. FUZAK: Wait.

MAGISTRATE MAXWELL: I think she can answer yes or no to that.

THE WITNESS: Would you repeat your question, please?

MR. FUZAK: Yes, are you stating that you have seen such a computation?

THE WITNESS: I can't recall right now.

BY MR. FUZAK:

Q. Have you seen any kind of paper on which there were placed figures relating to alleged injuries resulting in total damages as claimed by the Plaintiff corporations here?

A. I'm sorry, I'm not able to answer right now, I am just not able to answer.

MAGISTRATE MAXWELL: It's your statement you don't know?

THE WITNESS: I don't know, I really don't.

MAGISTRATE MAXWELL: Okay. Go ahead. Look, don't hesitate, Mrs. Muck, if you don't know, say you don't know?

THE WITNESS: Okay.

MR. FUZAK: Now, you made reference earlier to some figures which I believe you said that you and Mr. Herbert Frey had compiled and that you discussed with Mr. Weiss in connection with the damages asserted in this complaint, is that right?

THE WITNESS: Yes.

BY MR. FUZAK:

Q. All right. Have those figures or those papers been produced to the Defendant for their inspection in connection with these depositions for discovery?

A. I believe they were. The papers I speak of are the ones we submitted to you regularly, once a month.

Q. What -- would you mind describing those, describe those to me because I'm not familiar with what you're talking about?

A. Once a month we submitted a bill to you people representing our costs after you cut us off from our supply of materials. When you refused to deliver us materials we submitted you a bill.

Q. And by you, you mean Pine Hill?

A. I'm speaking of Pine Hill.

Q. Okay. Are those the papers to which you made reference?

A. These are the papers to which I'm making reference when Pine Hill refused to honor the contract and cut us off.

Q. Are there any other papers to your knowledge relating to this matter of the computation of this sum of two hundred and fifty thousand dollars damage as claimed?

A. Mr. Fuzak, you were speaking -- I told you the papers I was referring to in that one answer.

Q. That is right.

A. I answered that.

Q. Yes, I'm asking you now whether there are any other papers than those you just described which you personally know of that relate to the computation of this two hundred and fifty thousand dollars damage as claimed in the complaint?

A. I don't know.

Q. To your knowledge, Mrs. Muck, has the Plaintiff corporation any arrangements with any user of Ready-Mixed which require that user to buy all of its requirements or needs from the Plaintiff

corporation?

MR. WEISS: Your Honor, this subject was gone into with Mr. Burg.

MAGISTRATE MAXWELL: Burg, that is right. Do you know, Mrs. Muck?

THE WITNESS: I would like the question repeated please?

MAGISTRATE MAXWELL: All right.

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: I wish you would rephrase the question, Mr. Fuzak, because it confuses me entirely, I'm sorry.

MAGISTRATE MAXWELL: Try to rephrase it.

MR. FUZAK: I'll make an effort to. To your knowledge, Mrs. Muck, does the Plaintiff corporation have any contractual or other arrangements with any purchaser of Ready-Mixed Concrete pursuant to which that purchaser agrees to buy all of his requirements for a specified period of time from the Plaintiff corporation?

THE WITNESS: We had no -- no customers who must buy material exclusively from us. We have

jobs that we have contracted to supply them the Ready-Mixed Concrete to, I don't know which one you're referring to here, Mr. Fuzak.

BY MR. FUZAK:

Q. Well, in other words, is it fair to say and proper to say that the sales by the Plaintiff corporations are made to various customers on a job by job basis?

A. I would say it would be fair to say that.

Q. And, is it fair to say and proper to say that these customers of the Plaintiff corporations are not required during any specific period of time such as a year or six months or something of that nature to buy all of their needs of Ready-Mixed from the Plaintiff corporation?

A. If the customer has a job and has given us a contract, that job may go for two years on that particular project, in which we'll supply the concrete for it, does that answer your question?

Q. At a pre-determined and agreed upon price, is that right, that holds throughout the entire contract?

A. It would be a contract with a price of some sort,

possibly there would be an escalator in it, there is possibilities of that. I mean you might start a job and you might escalate the price, you may.

Q. All right. Mrs. Muck, Mr. Burg gave some testimony yesterday while you were here, I believe with respect to the manner or method in which prices are determined by the Plaintiff corporations for these commercial jobs, for Ready-Mixed Concrete. Do you remember generally that testimony?

A. Yes.

Q. All right. Would you describe for the record how you and your brother Herbert Frey go about establishing a particular price for a particular job, commercial job?

A. Well, right now it's difficult to state that how we do it, because we have such severe competition, sometimes our competition almost determines what the price would be.

Q. Well --

A. I mean, we used to be able to use a list price and go from there. But since we have been in such a highly competitive situation, each job has to be almost -- each job has to be individually bid and

depends on the competition.

Q. When you say you used to be able to use a list price and go from there, when was that that you used to be able to do that?

A. I would say in the last three to four years.

Q. You mean prior to three or four years ago you used to use a list price and go from there?

A. Yes, I would say that.

Q. Now, when you say you used to be able to use a list price and go from there, what do you mean by go from there?

A. Well, whatever the customer would specifically specify on this job, we would more or less take it from the list price and quote him accordingly.

Q. I'm very sorry, I didn't hear that, would you read it back to me?

(Whereupon, the above-requested testimony was then read back by the reporter.)

MR. FUZAK: Do you mean that you would have a list price or you did have a list price and if the customer came in and said that they wanted the Ready-Mixed at something less than the list price, that you would provide

it to the customer at that price?

THE WITNESS: That isn't what I said.

BY MR. FUZAK:

Q. Well, that is why I'm asking, would you mind explaining to me what you meant?

A. A customer would specify what the mix was and we would use our list price for that particular mix.

Q. And, did you during this period of time prior to three or four years ago, did you give price discounts on any occasions?

A. Yes, sir, there were occasions, we always give our two percent.

Q. I'm sorry, aside from the prompt payment discount, did you give price discounts before three or four years ago?

A. I don't like the term price discount, I would prefer you to say price reduction, is that agreeable?

Q. I will try.

MAGISTRATE MAXWELL: All right. Let's talk about price reductions, Mrs. Muck.

THE WITNESS: It would depend on the size of the job, where the job is located and we might be able to better the price probably within

a fifteen, twenty cents, I'm not -- I don't want to be held to fifteen or twenty cents, it depends on location and what we could do.

BY MR. FUZAK:

Q. There may have been occasions when the amount of the price reduction was more than that, is that correct?

A. It would be somewhat more, not too much more.

Q. Can you give me some idea of somewhat more of what you mean by that?

A. I don't think we would be much below fifty cents.

Q. You mean much more than a fifty cent per cubic yard price reduction?

A. Right.

Q. There have been occasions in this period, some three or four years before now when you gave fifty cent price reductions per cubic yard?

A. Right, prior to 19 -- let's see, probably -- prior to 1971 I'd say, somewhere around there, '71.

Q. Now, Mrs. Muck, let's continue talking about these price reductions prior to 1971 or thereabouts as you say, how did you arrive at the price reduction, did you have some kind of a formula or computation which you used in connection with the distance

involved or the volume involved or any of the other factors?

A. It would depend on how well we could service the job, it would depend on how close the job was to our different plants, it would depend on how large the job was and I would assume there were other things to be considered but I'm not able to remember everything.

Q. Well my question is this, let me rephrase it.

MR. WEISS: Excuse me a minute, your Honor, would this be a convenient time to take a break?

MAGISTRATE MAXWELL: I would just assume keep going for a while, I think we took a break an hour ago.

MR. WEISS: Might I ask a question then? Mr. Fuzak, is it Mr. Fuzak's intention to continue tomorrow morning subject to your Honor's availability?

MAGISTRATE MAXWELL: I can find out, but I'd like to continue at least through the normal day to day for a little longer if we'll accomplish anything.

MR. FUZAK: It's my intention to continue until we

complete.

MAGISTRATE MAXWELL: I don't know what my schedule is.

MR. FUZAK: According to your Honor's schedule.

MAGISTRATE MAXWELL: Could I have my diary, please? I cannot make it tomorrow afternoon, I cannot make it Saturday, I don't know what the situation is tomorrow.

MR. WEISS: The reason I ask your Honor, is I have a hearing tomorrow which I can adjourn if I get on the phone now, I want to know if it's necessary to adjourn it?

MAGISTRATE MAXWELL: Let me look at my calendar. We can start tomorrow at nine o'clock and go on through one or two o'clock.

MR. FUZAK: All right, sir.

MAGISTRATE MAXWELL: So if you want to take five minutes so you can make your adjournment. Let me know when you're ready.

MR. FUZAK: Thank you.

(Whereupon, a recess was then taken.)

MAGISTRATE MAXWELL: I remind you, Mrs. Muck, you're still under oath?

THE WITNESS: Yes.

BY MR. FUZAK:

Q. Mrs. Muck, before we recessed here, we were talking about the manner in which prices were arrived at on specific commercial jobs prior to about 1971 and in that connection let me ask you this question. Did the Plaintiff corporation have any schedule which it applied in order to determine how many cents off per cubic yards would be given on a particular job according on the volume of product required?

A. I don't believe we had a written schedule, Mr. Fuzak.

Q. Did you have any kind of a set schedule that you applied, that is so many cents off for a hundred cubic yards of Ready-Mixed and so many cents off for two hundred or something of that nature?

A. No, sir, nothing written down.

Q. Well, did you have anything set in your mind when you went about this task of determining what the prices should be on a particular job in that respect?

A. I don't believe so.

Q. All right. Did you have any such schedule of cents

off per cubic yard based upon the distance of the delivery required?

A. There was no set schedule.

Q. All right. Was any cost analysis done by the Plaintiff corporation to develop what cost differences there might be if any resulting from the difference in volumes being supplied to the customer?

A. Would you --

MR. WEISS: You mean the difference in cost to the Plaintiff corporation?

THE WITNESS: Would you repeat that question, I didn't get the full question.

MAGISTRATE MAXWELL: Go ahead.

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: I would say no, no written schedules.

BY MR. FUZAK:

Q. Well, I'm asking whether or not any kind of a cost analysis was done to develop any difference in cost to the Plaintiff corporation if there were any?

A. I would say I would like to answer this, there was no written cost at the time, we would have taken

into consideration different things, but it was not written down or any particular pattern followed.

Q. Well, are you saying that some study or analysis was done which told you and Mr. Frey that you saved so much money dependent upon the volume that you were supplying?

A. There was no record of that kept.

Q. I appreciate that, Mrs. Muck, but what I'm asking you is whether or not any analysis or study was done to develop whether there were cost savings to the Plaintiff corporation because of the volume of Ready-Mixed being delivered on a particular job, whether written or not?

A. Well, certainly we took the certain things into consideration and I think we could say that we would have taken in different cost considerations.

Q. Did the Plaintiff corporation develop any figures which indicated that there were specific costs savings to the Plaintiff corporation dependent upon the volume of Ready-Mixed Concrete that was being sold to a particular customer?

MR. WEISS: You mean a written form now?

MR. FUZAK: Any kind.

THE WITNESS: Would you repeat the question?

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: We have no records as to that type of costing.

BY MR. FUZAK:

Q. You've said that you have no records, but I'm asking whether or not that type of costing was done by the corporation as a basis for giving these price reductions based on volume?

A. When we -- we would sit down and we would discuss distance and different costs that were involved and that is how we arrived at a price.

MR. WEISS: I think that that is the answer, your Honor. She's saying they didn't have the specific schedule, that they would sit down and discuss it on each specific occasion.

MAGISTRATE MAXWELL: Did you ever have any standard formula, do you have any standard formula for determining the cost based upon volume regardless of where the job was or what type of job it was?

THE WITNESS: We had no such formula.

BY MR. FUZAK:

Q. Now is the same thing true with respect to the distance factor that was taken into consideration in arriving at the price to the customer that there was no standard formula which was used to determine the amount of price reduction based upon the distance of delivery?

A. I think I missed a word there, Mr. Fuzak, would you--

Q. Maybe you'll have to read it again, if you would?

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: There was no standardized formula.

BY MR. FUZAK:

Q. And, do you follow, and by you, I mean you and Mr. Frey, follow the same basic procedures today now in 1974 in determining prices to customers as you did in this period prior to about 1971 that we have been talking about?

A. Since we are in such a competitive position now, we take each job and we figure mileage and many other costs or all the other costs. Costs of materials, because we are figuring so close and we

find that we have severe competition.

Q. Well, do you today make use of any kind of standardized formula to determine how much price reduction will be allowed depending upon the amount of volume involved in the particular job?

A. We would like to do that, but we have to bid against competition and more or less the competition determines.

Q. Well, yes, but the answer to my question is no, that you do not do that?

MR. WEISS: She said she would like to do it.

THE WITNESS: I said we would like to.

MR. FUZAK: Well, in answer to my question, do you do it?

THE WITNESS: We compete as best we know how.

MR. FUZAK: I wonder if I might ask to have my question read back, the previous one?

(Whereupon, the above-requestes testimony was then read back by the reporter.)

THE WITNESS: I answered that.

MR. FUZAK: Would you answer it again?

MAGISTRATE MAXWELL: I'm not sure you did, if you can answer it again, Mrs. Muck?

THE WITNESS: Read it again?

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: We would like to take into consideration all of the costs factors but our biggest problem is our competition and we have to go -- they more or less set the price.

MR. FUZAK: That is not in my opinion an answer to my question.

MAGISTRATE MAXWELL: Let me ask you this. You start with some type of standardized formula and then start working depending upon what the competition is?

MR. WEISS: You mean today?

MR. FUZAK: 1974 we're talking about.

MAGISTRATE MAXWELL: Do you start with some figure, what your cost is, your overhead, your normal rate of profit might be and then work from there in trying to get business?

THE WITNESS: We try to, yes, but we --

MAGISTRATE MAXWELL: You start somewhere, I assume you start at what it actually costs you before there is any profit at all?

THE WITNESS: Yes, probably.

MAGISTRATE MAXWELL: Go ahead.

MR. FUZAK: But is it correct that you do not today use any kind of standardized price reductions schedule applicable to all customers depending upon the volume that is involved in the particular sale?

MR. WEISS: I think she said, your Honor, that she would like to.

MR. FUZAK: That is not an answer.

MAGISTRATE MAXWELL: In other words, do you or don't you, I assume you do not if your answer is --

THE WITNESS: We're not able to.

MR. FUZAK: All right, fine. Thank you. Do you make use of any kind of standardized schedule or formula to arrive at price reductions based upon the distance of delivery?

THE WITNESS: I would like the question because I -- read it to me again, please?

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: We're not able to.

BY MR. FUZAK:

Q. You do not, is that right?
A. That is right.
Q. Now, we're still talking in this period of time for example 1974, do you in all cases when you're attempting to get commercial work in the sale of Ready-Mixed Concrete, know in advance what prices are being quoted to the prospective customer by your competitors?
A. We have no way of knowing what our competitors quote at the time we quote.
Q. How do you arrive at the bids that you make on commerical work which is competitively bid?
A. Repeat.

(Whereupon, the above-requested testimony was then read back by the reporter.)

MR. WEISS: Today again, you mean?
MR. FUZAK: In 1974, yes.
THE WITNESS: Are you talking the final figure now?
MR. FUZAK: Well --
MAGISTRATE MAXWELL: You submit a bid, I assume you submit a written bid for the Skyway job?
THE WITNESS: Yes.
MAGISTRATE MAXWELL: Certain price he's asking you,

how you arrive at that price, I believe?

MR. WEISS: I think she's saying the initial bid or the final bid.

THE WITNESS: That is what I mean.

MAGISTRATE MAXWELL: Are there two separate bids made?

THE WITNESS: There's not two separate bids made, but we try to include our costs and a fair share of profit when we quote, and then after it's quoted in order to get a job, we have to then bid against the competition. It's almost like two times you're bidding.

MAGISTRATE MAXWELL: You're submitting one price, one final price though say to Higgins or Cowper or whoever it may be, aren't you?

THE WITNESS: It's never a final price, the first quote you make.

MAGISTRATE MAXWELL: All right.

MR. FUZAK: Well, let me ask you about that then. Because apparently I'm not clear. Am I correct that there are jobs on which there is competitive bidding and people submit sealed bids for Ready-Mixed Concrete in commercial work?

THE WITNESS: It's never submitted as a sealed bid, I don't believe.

BY MR. FUZAK:

Q. Okay. In connection with the competitively bid commercial work, is it the practice of the Plaintiff corporation to submit a bid and then negotiate further price reductions or some price reductions from that bid?

A. Repeat it please?

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: Yes.

MR. FUZAK: At the time that you submit your bid, your first bid as it were, to this competitively bid commercial customer, do you know what the bid of other competitors of yours would be?

THE WITNESS: At the time, no.

MR. FUZAK: Excuse me just a minute.

MAGISTRATE MAXWELL: Certainly.

MR. FUZAK: Mrs. Muck, we're talking about the situation roughly in 1974 still, and bids placed on this commercial work as to which

there is competitive bidding, how does your corporation know that another bid ought to be submitted by you, lower than the first one you put in?

THE WITNESS: Repeat it.

(Whereupon, the above-requested testimony was then read back by the reporter.)

MR. WEISS: I object to the form of the question.

MAGISTRATE MAXWELL: On what basis, Mr. Weiss?

MR. WEISS: Your Honor, it says on what basis, does it not, I think he's probably trying to ask does it come to your attention that someone else has placed lower bids or something like that?

MAGISTRATE MAXWELL: Do you understand the question, Mrs. Muck.

THE WITNESS: I think I do.

MR. WEISS: Okay, you can answer it.

THE WITNESS: Okay. We don't submit a second bid. Ordinarily a contractor will call us in, chiefly, probably because they prefer our services, they probably prefer our drivers and they will tell us I have a bid for so

much, do you care to meet it. And, we have to determine at that time if we can to meet it.

MR. FUZAK: I see. And then if you care to meet it you make that bid and you may or may not get the work?

THE WITNESS: We may.

MR. FUZAK: Is that right?

THE WITNESS: Right.

MR. FUZAK: I'm sorry, I'm takir these couple minutes to speed this thing up if I can.

MAGISTRATE MAXWELL: I'm hopeful that you are, Mr. Fuzak.

MR. WEISS: Delay of the game, your Honor.

MAGISTRATE MAXWELL: We'll give you five yards on that, cubic yards.

MR. FUZAK: Has it been the practice of the Plaintiff corporation in 1974 and for the past several years to submit initial bids for the basis of the Plaintiff corporation's list price?

THE WITNESS: We try to hold to our list price if it's at all possible.

BY MR. FUZAK:

Q. Has that been the practice of the company to submit the initial bid on the basis of list price?

A. Yes, I would say so.

Q. And, then has it been the practice of the -- of the Plaintiff corporation to make such price reductions and to make such other arrangements to reduce the cost to the purchaser as the Plaintiff corporation feels is necessary to get the job?

A. Repeat it.

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: I'd like it read over, please.

(Whereupon, the above-requested was then read back by the reporter.)

THE WITNESS: When our men go in after -- let me start that over again. After a job has been let with a specific contractor, our men will call on this contractor. They never tell us exactly who we're bidding against, we know many times it's our competitor, Pine Hill, we're not positive exactly what they have quoted. But we try to, they will

say, if you give us -- I don't want to give a specific example because it wouldn't be all true, but if you can get your prices down within so much you can have the job. And many times these people will give us a job, maybe a few cents more than our competition is because they do prefer to deal with us.

BY MR. FUZAK:

Q. Fine.

A. And, I know we have a good service and we have quality material and our customers like our drivers and we try to accomodate them.

Q. Fine. That is very good.

MR. FUZAK: Your Honor, I would conclude with Mrs. Muck subject to, of course to any further questioning that might be necessitated by examination of these documents.

MAGISTRATE MAXWELL: Do you have any questions for the record at this time, Mr. Weiss?

MR. WEISS: Not at this time.

MAGISTRATE MAXWELL: You're excused at this particular time, Mrs. Muck. It's my understanding

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626-629 Liberty Bank Bldg.
Buffalo, N. Y. 14202
853-5600

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY, READY-MIXED CONCRETE, INC., et al,

Plaintiffs,

-vs-

PINE HILL CONCRETE MIX CORPORATION, et al,

Defendants.

Proceedings taken before the HONORABLE EDMUND F. MAXWELL, taken pursuant to notice, at United States Courthouse Building, Buffalo, New York, taken on November 25, 1974, commencing at 9:55 A.M.

APPEARANCES: RAICHLE, BANNING, WEISS & HALPERN,
By ARNOLD WEISS, ESQ.,
10 Lafayette Square,
Buffalo, New York,
Appearing for the Plaintiffs.

ARNOLD WEISS
10 La[illegible] Square
Buffalo, New York 14203

Jack W. Hunt C. S. R.
OFFICIAL SUPREME COURT REPORTER
& Associates

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HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR,
By VICTOR T. FUZAK, ESQ.,
1800 One M & T Plaza,
Buffalo, New York,
Appearing for the Defendants.

MANZ, MANZ & DIVIAK,
By VICTOR E. MANZ, ESQ.,
425 Statler Hilton Hotel,
Buffalo, New York,
Appearing for the Defendants.

PRESENT: ADRIANNE TUSZYNSKI, Reporter.

MAGISTRATE MAXWELL: My understanding, that Friday there was an adjournment of these depositions for the purpose of examining records which have been referred to in the testimony by Mrs. Muck on last Thursday. It's my understanding --

MR. FUZAK: That's correct.

MAGISTRATE MAXWELL: -- the examination of the records is complete and we hopefully can terminate the complete testimony of Mrs. Muck at this time.

MR. FUZAK: Yes. I'd like to have Mrs. Muck retake the stand at this time.

MAGISTRATE MAXWELL: Mrs. Muck? You have been previously sworn, Mrs. Muck, may I remind

you that you are still under oath?

LOIS AUDREY MUCK: Yes.

L O I S A U D R E Y M U C K, having been previously duly called and sworn, testified further as follows:

DIRECT EXAMINATION BY MR. FUZAK:

Q. Mrs. Muck, on last Thursday we had some conversation and discussion about a personal file which you described as a personal file that you maintained, do you recollect that discussion?

A. Yes, sir.

Q. And, did you produce on Friday for our examination, everything from that personal file that relates to this matter that you know of?

A. Yes, sir.

Q. Have you got any other documents that were in your personal file or otherwise, that are in the nature of notes or memoranda or statements, concerning any conversations that you were present at or -- that you were present at, that relate to the contract?

A. I -- I brought everything that was pertaining --

pertinent to this.

Q. And, that includes, does it, any kind of notes or memoranda or statements with reference to any conversations that you were present at, with any of the Pfohls regarding this contract, the negotiations of it or the performance under it?

A. I believe I answered that.

Q. The answer is yes?

A. Yes.

Q. And, does it also include, the materials you produced here, does it also include any documents of that nature relating to any conversations at which you were present, involving Mr. Harold Kelly, concerning the negotiation of the contract or the performance under the contract?

MR. WEISS: You mean which there were other persons present, third-parties present, so it's not privileged?

MR. FUZAK: I don't know whether Mr. --

MAGISTRATE MAXWELL: I think she can answer yes or no to that, to that question.

THE WITNESS: Could you read it back, please?

(Whereupon, the above-requested testimony

was then read back by the reporter.)

THE WITNESS: Mr. Fuzak, I went through my file and I pulled out all information pertaining to this case, and I brought it in. Whatever you have there, is what I had.

MR. FUZAK: Yes, but you recollect that I asked you on Thursday, whether or not you had any notes or memoranda concerning some conversations at which you said you were present involving Mr. Harold Kelly that relate to this contract, and my question to you now is, whether or not there are such memoranda or notes?

THE WITNESS: I told you, you have everything I have.

MAGISTRATE MAXWELL: Do I understand it, in your reviewing these records, this personal file, Mrs. Muck, you found no memoranda?

THE WITNESS: I brought everything I have to this case along with me.

MAGISTRATE MAXWELL: And there's no other memoranda relating to that case, whether it's with Mr. Kelly or any other person, which has not been made available to Mr. Fuzak, is that

right?

THE WITNESS: To the best of my knowledge,

MR. FUZAK: Now, I wonder if Mr. Weiss could produce those papers from the personal file that we looked at, so we could mark them and have them identified?

MR. WEISS: I didn't bring the original, I just brought my copies over. You have copies, too.

MR. FUZAK: I have copies, but I expected that you were going to bring the originals. The copies I have aren't that legible for one thing, and also are not the originals, which I'd like to have marked as exhibits.

MAGISTRATE MAXWELL: Well, did you have an opportunity to examine the originals, Mr. Fuzak?

MR. FUZAK: I did.

MAGISTRATE MAXWELL: All right. Where are the originals, Mr. Weiss?

MR. WEISS: Back in my office.

MAGISTRATE MAXWELL: Shouldn't the originals --

MR. WEISS: Well, they have copies and I have copies.

MAGISTRATE MAXWELL: Well, I realize that. Is there any reason why we can't go along with the copies at this time?

MR. FUZAK: I'll proceed with the copies. I would like to do that, with the understanding however that the originals would be substituted for copies.

MAGISTRATE MAXWELL: They always should be marked.

MR. WEISS: I don't like them being carried around.

MAGISTRATE MAXWELL: I appreciate that. Why don't we mark this exhibit, these copies at this particular time, and after our recess, we can have the originals marked and then you can return them to a safe place. Have we had any documents marked during the course of this deposition?

MR. FUZAK: We haven't, no sir.

MAGISTRATE MAXWELL: All right. Let's mark these various documents as 1-A, 2-A, 3-A. The A, B, being the copy -- the numerals being the designation which will be made on the originals. Defendant's 1, 2, 3. Has there been prior continuity of marking documents?

MR. FUZAK: Yes, I was just looking to see if we could find the last exhibit number so we could proceed from there.

MR. WEISS: I think that's right. A, B.

MR. FUZAK: Your Honor, the last exhibit that was marked in these depositions is designated capitals AB. Defendant number AB. I wonder if we might start to mark exhibits here, Defendant's AC.

MAGISTRATE MAXWELL: A-C?

MR. FUZAK: No, just AC together, two capitals is the way they have it

MAGISTRATE MAXWELL: We also put them under this date, too. How is it going to be, AC, AD, AE or --

MR. FUZAK: Yes, that's apparently the way they started, double A, and then AB and so on.

MAGISTRATE MAXWELL: How are we going to mark the originals then, when they're marked, or how are we going to designate the difference?

MR. WEISS: Why don't we do it the same way then, strike out the number physically, erase the mark --

MR. FUZAK: What I'm going to do with this group of papers is, have them marked AC-1, AC-2, and so on, since they came from the same source, if that's all right?

MAGISTRATE MAXWELL: All right. Let's do it that way.

MR. FUZAK: Mrs. Muck, first I would like to hand you a set of Xerox copies of papers, and ask you whether or not they represent copies of the original papers which you took from your personal file and provided for our inspection here on Friday?

THE WITNESS: Yes, they are.

MR. FUZAK: And, they represent copies of all papers, do they, that you brought from your personal file and which were made available for our inspection on Friday?

THE WITNESS: Yes.

MR. FUZAK: Now, would you mark as AC-1, a sheet which has the year at the top on the left, 1957 and begins Friday, October 11. Would you mark as Exhibit AC-2, four sheets, the first one being numbered one and again with

the year notation, 1957 and the first date, December 26th. And, would you mark as Exhibit C-3, two pages, the first of which is headed --

MR. WEISS: AC-3?

MR. FUZAK: AC-3. The first of which is headed Pine Hill and George C. Frey and again, bearing the date 1957 and Friday, November 1. Would you mark as Exhibit AC-4, a single sheet -- two sheets, pardon me. Mrs. Muck indicates that these two sheets I'm holding go together, the first of which has no particular title, but begins P period H period C period agrees to and so on.

MR. WEISS: Could I see which one that is, please, Mr. Fuzak?

MR. FUZAK: That one and the next one apparently goes with it, according to Mrs. Muck. And, would you mark as Exhibit AC-5, a single sheet which starts off Joseph Pfohl made the statement, and so on. Has some computations on it. And, as AC-6, a single sheet which has the heading April 12, 1956,

agreement between George C. Frey and -- and then has one line of writing on it. And, as Exhibit AC-7, a single sheet bearing the heading Monday, November 4, ten A.M. and as Exhibit AC-8, a single sheet bearing the heading memoranda re agreement, Wednesday, 8/18/71.

(Whereupon, nine documents were then received and marked Defendant's Exhibits AC-1 through AC-8 for identification.)

BY MR. FUZAK:

Q. Mrs. Muck, would you look at Defendant's Exhibit AC-1 for identification and tell me whether the notations on that sheet are in your hand?

A. That is Mrs. Frey's writing.

Q. That's your mother? And, were you present when she made those notes?

A. I cannot recall.

Q. Okay. Would you look at Exhibit AC-2 for identification and tell me whose hand, if you know --

A. That's my mother's, too, Mrs. Frey.

Q. These notations on all four of these papers again --

A. Right.

Q. -- are made by your mother? Is the same true with reference to AC-3, this two page exhibit?

A. Yes.

Q. These are also in your mother's hand. And, do you know, were you present at the time that these notations were made on Exhibit AC-2, for example?

A. I was aware the meeting took place.

Q. Yes, but I'm asking you about being present at the time that Mrs. Frey, your mother, made these notes? Did you see her make them?

A. I couldn't recall.

Q. Did you see her -- did you see your mother make these notes on Exhibit AC-3 for identification?

A. I couldn't recall that.

Q. Would you look at Defendant's Exhibit AC-4 and tell me if you can, whose hand the notations on those two sheets are in?

A. That's Mrs. Frey's.

Q. And, your mother? And, the second sheet, is the same true of the second sheet?

A. Right.

Q. And, were you present at the time that she made the notations on these two sheets?

A. No.

Q. You recognize wherever your mother's handwriting is?

A. Yes.

Q. Defendant's AC-5, in whose hand?

A. That's Mrs. Frey's.

Q. Were you present at the time those notations were made?

A. Yes.

Q. You were. Did you see her make those notations?

A. I remember very vividly being there, and I can almost say I remember her making these notes.

Q. All right, fine. Thank you. Defendant's AC-6, can you tell us whose hand that is?

A. That's Mrs. Frey's.

Q. And, were you present at the time those notations were made?

A. I don't recall.

Q. Defendant's AC-7?

A. Mr. Fuzak --

Q. Yes?

A. -- I -- perhaps would recall if these two were together, and I -- there's a possibility that these two might go together.

MAGISTRATE MAXWELL: Which --

BY MR. FUZAK:

Q. When you say these two, there's a possibility that Defendant's AC-6 and AC-5, are part of the same --

A. I think they're the same sheet, but I'm not sure. But, I do remember this other one.

Q. You remember AC-5, but you don't remember AC-6?

A. I would have to look at the original.

Q. Would you look at AC-7 and tell us whose hand those are in?

A. Mrs. Frey's.

Q. Were you present at the time those notes were made?

A. I don't recall.

Q. Would you look please at Defendant's AC-8 and tell us whose hand those notes are in?

A. Mr. Moran.

Q. Mr. Moran, and were you present at the time those notes were made?

A. Yes.

Q. Now, Mrs. Muck, also from your personal file, I believe that you provided to Mr. Weiss some kind of typed pages, I believe they were. Is that right?

A. I believe -- I don't know what you're talking

about, Mr. Fuzak.

Q. Well, in addition to those documents that we have marked here, AC-1 through AC-8, as I understand it, from your counsel, there was also produced from your personal file, some typed notes or some typed papers, is that correct?

A. Last Friday when I came in here, you asked me Thursday morning or afternoon, I can't recall -- afternoon, to bring in my file pertaining to our contracts. And, I brought that file in. Then, you also asked me for pertinent personal papers and I brought those in separately. So, there would actually be two envelopes.

Q. Well, perhaps it's more appropriate to address the inquiry to Mr. Weiss. On Friday when we reviewed these papers, Mr. Weiss indicated that he had a document, I don't know how many sheets it had, I did see from farther, it did have typing on it, which he said is privileged. And, I would like to have that record and the determination made by the Magistrate as to whether or not it is privileged.

MAGISTRATE MAXWELL: Mr. Weiss?

MR. WEISS: Well, your Honor, I don't recall offhand

whether this was in Mrs. Muck's personal file or in the other file, but it's no matter. There was a document of several pages which contained on it notations, numerous conversations with attorneys, for the Plaintiffs and -- do you recall, Mrs. Muck, which envelope it was in?

THE WITNESS: No, sir.

MR. FUZAK: Well, what -- excuse me. Are you through? What I'm requesting, your Honor, is that that particular document be produced here, so we can have it marked as an exhibit in these proceedings. And, then make a determination as to whether or not it is privileged. It may have been disseminated to non-confidential sources, it may not be privileged to any of them.

MAGISTRATE MAXWELL: What do you have to say about that, Mr. Weiss?

MR. WEISS: Well, I think, your Honor, that I feel very strongly of the attorney-client privilege and I think of the other side seeking to mark as an exhibit, documents of

which there is an attorney-client privilege, should make some showing of why they don't think the privilege applies.

MAGISTRATE MAXWELL: Of course, as I understand it, in this particular situation, there were some records or files or sheets -- I take that back, sheets, which were in one of these files which were not produced for examination by Mr. Fuzak, on the statements by you that they were privileged, and that they bore some notations evidently of conversations between parties. Between -- with attorneys. How else can we make a determination as to --

MR. WEISS: Well, I would say this, your Honor --

MAGISTRATE MAXWELL: Other than what's been suggested by Mr. Fuzak?

MR. FUZAK: Of course I haven't seen those papers.

MAGISTRATE MAXWELL: I realize that. I assume nobody has seen those papers other than Mr. Weiss and his client.

MR. WEISS: For example, there are three letters on the letterhead of the attorney for Mrs. Muck, addressed to Mrs. Muck or to Mr. Frey

or to the Plaintiff, and it would seem to me that on the letter -- that the result of not doing it this way, your Honor, would be that it then becomes appropriate in every litigation for the other side to say, I'd like to have your attorney's correspondence file in total, turned over to the judge and let him leaf through there and see if there's anything not privilege. Unless that has to be the result, your Honor, there must be some special showing. Now, I could see where there are special circumstances, I think we had one before your Honor which was an unusual circumstance, but to have an attorney's correspondence file without any showing -- well, in that case, they might as well ask for the entire attorney's file and they might be prepared to produce their own. I don't think your Honor would want to be burdened in going through their file. Following his reason, any letter in their file which might have -- would have to be examined to see if it's -- I'm sure they

have a couple of inch thick files and I don't see -- I don't believe the law is -- the state of the law is today that everything must be justified on the basis of privilege. I think rather, there's a burden on them to come forth with some type of a showing that there is something special about this.

MAGISTRATE MAXWELL: As I understand it, under normal situations, in the situation -- when we have a situation such as this, there would be some -- there would be one of two ways of handling it. Either a -- a relatively complete description of the document, which description might on its face or by itself show that it is privilege or in the alternative, an in cameral inspection.

MR. FUZAK: Your Honor, part of the problem of course is, we have not been given an opportunity to look at these papers in the first place, and in the second place, they are of course not the attorney's file. They are records from the corporate records and from Mrs. Muck's personal records,

and I think before we can make any arguments or determination can be made, they have to be inspected by someone. I'm not asking they be inspected in advance, I'm asking -- but I think they should be marked, certainly.

MAGISTRATE MAXWELL: I don't know of any other type -- any other way of handling the problem, Mr. Weiss. As I understand it, there was a request for inspection of a -- documents in Mrs. Muck's file, which would relate to this matter and pursuant to that request, she did produce some documents which I assume were examined by you, prior to turning over to Mr. Fuzak. And, it was your determination, or your feeling and belief, that one of those documents --

MR. WEISS: One or more.

MAGISTRATE MAXWELL: -- one or more would come within the attorney-client privilege.

MR. WEISS: Well, the problem -- I don't argue that -- that there's a requirement for the Judge or someone to have an in cameral inspection.

I'm only saying that for anyone to say without any reason, I'd like to see any lawyers -- Mrs. Muck has a great many lawyer's letters. Her file, I'm sure Mr. Fuzak's client has a great many.

MAGISTRATE MAXWELL: I assume that those lawyer letters have not been produced at this particular time, and there's no request for production of those letters. The request is for examination in cameral of either one or two or whatever it is, particular documents which Mrs. Muck produced pursuant to the request. I feel that there should be an in cameral inspection at least of these documents.

MR. WEISS: Well, it -- it is frequently the practice of attorneys to remove from materials, any privileged correspondence because of this. And, I believe that if this ruling is followed to the logical conclusion, your Honor, that it will result eventually in a notice to produce all letters including letters from your attorney, and then we will go through

the procedure of having the Judge having an in cameral inspection of all of those letters.

MAGISTRATE MAXWELL: This I know is a very important case to both of you, I realize it's a case that's very involved, very detailed and it may be that under this case, such a procedure might be done. I don't know, but at this particular time, there has been no requests by the Defendant of the review of all of the files of all of the attorneys for the purpose of determining what is privilege and what is not. There's a request as I understand it, only for a determination as to whether the privilege applies to, as I understand it, one or two typewritten sheets of paper.

MR. WEISS: Four.

MAGISTRATE MAXWELL: Four documents which were in Mrs. Muck's file.

MR. WEISS: One of which -- are you asking, I don't know, Mr. Fuzak, are you asking also for the letterhead, the correspondence on --

MR. FUZAK: Yes. I'm asking that the -- that all

the documents that were in those files, to which you claim the privilege attaches, be marked for identification. I'm not asking that I be shown them, but present them to the Magistrate to determine whether or not they are subject to the claimed privilege.

MAGISTRATE MAXWELL: I'm going to ask -- I think -- that's the only way that I can see it should be done at this particular time. So, I'm going to ask that they be marked at this particular time. I think they should be marked as Court Exhibits for the purpose of an in cameral inspection, by me.

MR. WEISS: We will -- I don't have them here, your Honor. May I bring them over the lunch --

MAGISTRATE MAXWELL: All right, fine. You say there are four documents, right?

MR. WEISS: I believe there are four.

MAGISTRATE MAXWELL: All right.

MR. WEISS: One of which consists of more than one sheet.

MAGISTRATE MAXWELL: Is there any possibility, Mr. Weiss, that somebody from your office may

be familiar with where they are, so --

MR. WEISS: At this moment, I'm not sure myself.

MAGISTRATE MAXWELL: Because I'd like to be in a position to examine them over the lunch hour. I don't want to bring back Mrs. Muck another day, if we can make a determination on it quickly.

MR. WEISS: If your Honor would have a mid-morning recess I would go back --

MR. FUZAK: Perhaps what we can do, perhaps I can finish with Mrs. Muck subject to that, and Mr. Weiss can get those papers and we'll go ahead.

MAGISTRATE MAXWELL: Okay, fine.

BY MR. FUZAK:

Q. Mrs. Muck, you also produced on Friday, pursuant to our request, what you had described as a corporate file relating to the contract and to the matters in issue in this lawsuit. Isn't that right?

A. Yes.

Q. Now, in this corporate file, were there any notes or memoranda or statements relating to conversations involving Mr. Harold Kelly, the attorney, that you

know of?

A. Mr. Fuzak, I would have to review the file. I brought it -- I went home Thursday evening and I removed it from my -- the safe, and I brought it in Friday morning. And -- to be frank with you, just glanced through it and I cannot recall.

Q. Your Honor, I'd like to avoid long business on this. All I'm trying to establish on this, I reviewed that particular file with Mr. Weiss in my office on Friday morning and I found no notes or memoranda or statements relating to conversations with Mr. Harold Kelly or with the Pfohls or the Defendants, concerning this contract, either the negotiation or the performance of it. That's all I want to establish, if that's correct. Is that right, Mr. Weiss, to your knowledge?

MR. WEISS: Well, I really didn't look at the file from that point of view, Mr. Fuzak. I think the file speaks for itself.

MR. FUZAK: Well, perhaps we better bring the file over too --

MR. WEISS: You have a copy of the file.

MR. FUZAK: I don't have a copy of the entire file,

I have selected items out of it. I just want to negate disclosure of files.

MAGISTRATE MAXWELL: All right. Let -- that will be marked when it's brought.

BY MR. FUZAK:

Q. Mrs. Muck, part of that file which was, let us call it the corporate file, because that's the way it was talked about on Thursday, was a group of price lists which I have made copies of, and I would like to hand you those copies. There are eight sheets, and ask if you can identify those as having come from that file? For Mr. Weiss' benefit, there were in fact more than eight sheets, but some of them were duplicates of the same things, so I removed the duplicates, so there are eight sheets from different companies.

A. These are the -- yes.

Q. And, has the corporation had these various price sheets from these various companies since the time, at or about the time they were issued as indicated by the dates on each one of them?

MR. WEISS: Now, I think that's a difficult question, your Honor. I don't know what the purpose of

that is, but it's going back over a period of almost twenty years, saying did you have it from on or about the date that it bears. Here's -- the first one is dated January 16th, 1956. I don't know how that she can be asked --

MR. FUZAK: I'm sorry, you are looking at the wrong group. That's a letter. The group I'm talking about, I think the earliest one is June 10, 1967.

MAGISTRATE MAXWELL: Maybe Mrs. Muck understands the question more so than we do.

MR. WEISS: It wasn't a question --

MAGISTRATE MAXWELL: It was a question. If she can understand it.

MR. WEISS: If he's saying were they kept in the ordinary course of business or in your possession, I don't object, but, I think he wants to say did you have them from on or about the date they bear.

MAGISTRATE MAXWELL: Do you understand the question, Mrs. Muck or would you like it re-read?

THE WITNESS: I think I would like it re-read.

MAGISTRATE MAXWELL: All right, fine. Would you re-
read it, please?
(Whereupon, the above-requested testimony
was then read back by the reporter.)
MR. WEISS: I think you should take them one by
one.
MAGISTRATE MAXWELL: She can either say yes or no,
or yes to some or no to others.
THE WITNESS: I'm not able to recall on something like
this. I really couldn't.
MR. WEISS: We agree they're in our files.
MAGISTRATE MAXWELL: All right. I think she can answer
the question, Mr. Weiss.
MR. FUZAK: Mrs. Muck, you -- is it your testimony
that you can't recall whether or not these
sheets were received by the corporation at
or about the time that each one of them is
dated here?
THE WITNESS: I can't recall, sir.
MR. FUZAK: Do you know how long these papers have
been in the corporate files?
THE WITNESS: For several years.
MAGISTRATE MAXWELL: Are you going to have them marked,

Mr. Fuzak?

MR. FUZAK: Yes, I am, sir. I suppose we better go through the same procedure of marking each one independently.

MAGISTRATE MAXWELL: I think so.

MR. FUZAK: Will you mark these AD-1 and so on, as we go through. The first one being on the letterhead of tne Buffalo Slag Company, Inc., 1971, price list effective 12/26/1970. That would be AD-1.

MR. WEISS: You are not going through these in order, then?

MR. FUZAK: No. That would be AD-1.

(Whereupon, a document was then received and marked Defendant's Exhibit AD-1 for identification.)

MR. FUZAK: And, would you mark that as AD-2, on the letterhead of the General Crushed Stone Company, Olean Plant, price list effective March 1, 1971.

(Whereupon, a document was then received and marked Defendant's Exhibit AD-2 for identification.)

MR. FUZAK: Now, since these are in series, I'm going to describe them first and we'll mark them when we get through. AD-3, Dan Gernett, G-E-R-N-E-T-T. Gravel Products, Inc., price list effective January 4, 1971. As Exhibit AD-4, the title Frey Sand & Gravel Corp., price list as of 3/1/71. As AD-5, Batavia Washed Sand & Gravel Company, Inc., price list with a date, June 10, 1967. AD-6, Batavia Washed Sand & Gravel Company, Inc., dated --

MR. WEISS: You just did that.

MR. FUZAK: No. Dated April 15, 1970. That's a subsequent one.

MR. WEISS: April 15 of '70?

MR. FUZAK: Right. As AD-7, Elmira Transit Mix, Inc., Olean Plant, price list effective February 1, 1969. AD-8 --

MR. WEISS: Would you just hold on?

MR. FUZAK: Yes, that was February 1, '69.

MAGISTRATE MAXWELL: Right.

MR. FUZAK: DeWitt, D-E-W-I-T-T, price list 4/15/70. And, that represents the group.

(Whereupon, six documents were then received and marked Defendant's Exhibits AD-3 through AD-8 for identification.)

BY MR. FUZAK:

Q. Mrs. Muck, if you would look please at Defendant's AD-2, the General Crushed Stone Company price list, effective March 1, 1971, do I understand that this list shows the gross price for various products offered for sale by that company, including for example, screened gravel, crushed gravel and so on?

A. Yes.

Q. And, would you tell us what the net prices are as indicated by this Exhibit, AD-2 to your understanding?

A Sir, I couldn't -- couldn't tell you because we are afforded a volume discount.

Q. This price list apparently indicates that all gravel prices are subject to a discount of ten cents per net ton for payment of invoices by the twenty-second of the month, succeeding shipment and so on?

A. I'm sorry, I didn't understand your question, that's it.

Q. That is a prompt payment discount, is that right,

for gravel?

A. Yes.

Q. Now, has Frey -- have the Plaintiff corporations bought in the years 1971 to date, gravel from the General Crushed Stone Company?

A. We have bought materials from them on and off for our West Seneca Plant.

Q. Gravel materials?

A. Yes.

Q. And, have you bought any such gravel materials for your Peppermint Road Plant from this company?

MR. WEISS: I might state, your Honor, that if the witness needs time to check records, she ought to be able to --

MAGISTRATE MAXWELL: I think she can try and answer from her own recollection, and if she says she can't remember independently, she will be given an opportunity to examine those records. Mrs. Muck, I want you to appreciate that so we don't have to advise you at all times. If you have an independent recollection of it, fine. If you have no independent recollection of it, you so state

and you will be given an opportunity to look at those records, if it's felt necessary for the purpose of looking at the records. I don't think she has to be questioned to that extent every time a question is made.

THE WITNESS: Sir, I would have to refer to our records.

MR. FUZAK: Is it your testimony you have no recollection whether or not in the past four years, from 1970 to date, your company purchased no materials from the General Crushed Stone Company for your Peppermint Road Plant?

THE WITNESS: I can't recall. I would have to check my records on that to give you an accurate answer.

MR. FUZAK: All right. May I ask we set up some sort of a procedure by which Mrs. Muck can give us an answer, so we can incorporate it into the record?

MR. WEISS: We'll see if we can bring it over the lunch hour.

MAGISTRATE MAXWELL: Why don't we --

MR. WEISS: That's a little difficult.

THE WITNESS: I would have to call the office.

MAGISTRATE MAXWELL: All right. You can call the office over the lunch hour, as to those kind of questions.

MR. WEISS: We'll try to do that. If not, we can furnish it by a letter.

BY MR. FUZAK:

Q. Now, in connection with the purchases of gravel materials which you indicate were made by the Plaintiff corporation for your West Seneca Plant, that's your West Seneca Batcher Plant or Ready-Mixed Plant, is it?

A. Yes.

Q. Did you purchase those materials in accordance with the price list, at least beginning as of March 1, 1971, the effective date?

A. Again, I'll have to refer to my records.

Q. Do you know whether or not the company -- I think you made reference to the company having received discounts in addition to the ten cents per net ten prompt payment discount. Do you know whether or not such discounts were afforded your company?

A. We have -- we have some type of volume arrangement, I would say.

Q. Do you know what it is?

A. I would have to refer to my books again.

MR. WEISS: I would -- maybe I'm not going to be helpful, but there are affidavits on file which might refresh her recollection, in which we give the prices, your Honor, of the gravel from each of these companies. Would that -- would that help you, Mr. Fuzak?

MR. FUZAK: No, not really because there appear to be different prices of record. I am trying to get set in my mind what the actual prices were that were paid by the Plaintiff corporation.

MR. WEISS: I don't think we can do that over the lunch hour.

MAGISTRATE MAXWELL: She's going to check her records and she'll come back if necessary.

BY MR. FUZAK:

Q. Now, if I were to ask you essentially the same questions with reference to AD-1, here, the Buffalo Slag Company, Inc., can you answer without

reference to your records?

A. I would have to refer to the records, Mr. Fuzak.

Q. And, is that true with respect to AD-3, Dan Gernett Gravel Products, Inc.?

A. It's the same.

Q. In other words, you can't recollect whether or not your company received discounts from Dan Gernett Gravel for gravel purchased?

A. I can recollect we have, but I would like to be accurate.

Q. All right, fine. You don't recollect what they were?

A. No, I don't.

Q. Now, does the Plaintiff corporation also make purchases of materials of Ready-Mixed Concrete from Frey Sand & Gravel Corp.?

A. Yes.

Q. I'm showing you Defendant's Exhibit AD-4, Frey Sand & Gravel Corp. price list as of March 1, 1971. Does that represent what the Plaintiff corporation pays for materials purchased from Frey Sand & Gravel Corporation?

A. I think it does.

Q. Does Frey Sand & Gravel Corp. allow the Plaintiff corporation any discounts other than the noted ten cents per ton discount for prompt payment?

A. To the best of my knowledge, no.

Q. And, have you had occasion to check that recently, I mean you say to the best of your knowledge. Do you know whether that's the fact or not the fact in your position as an officer of the company?

A. Yes.

Q. You do know that there have been no discounts provided by Frey Sand & Gravel Corp. to the corporation other than the prompt payment discount, is that correct?

A. That's right.

Q. Are you an officer of Frey Sand & Gravel Corp., Mrs. Muck?

A. Yes.

Q. And, a stockholder as well?

A. Yes.

Q. Do you own or does your -- is the stock ownership the same as it is for Frey Concrete, Inc., basically, fifty percent between your family and Mr. Herbert Frey's family?

A. Yes.

Q. Would you explain for me the last sentence of Exhibit AD-4, which says, "We reserve the right to limit shipment of sizes whenever necessary." Close quotes. Could you tell us what that means? And, it's signed -- this is the Frey Sand & Gravel Corporation price list, of course?

A. Yes. It would mean that if we haven't washed enough of a certain product, that we would have to say we didn't wash enough of that product.

Q. Does it mean in effect, that your ability to provide materials is dependent upon the availability of those materials to you at that particular time, something of that nature -- let me withdraw the question.

A. Yes, I think you better.

Q. All right. In other words, if you feel you don't have the material to sell at a particular time, you reserve not to sell it to a particular customer?

A. That's right.

Q. Mrs. Muck, are you familiar with the price that your father, George C. Frey, paid for the land and the buildings which are covered by the contract described in your complaint, dated May 17th, 1949? Would you repeat that for Mrs. Muck, please?

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: I am familiar with that, but I would prefer to have the original document in front of me, when I answer any questions pertinent to that.

BY MR. FUZAK:

Q. Would it refresh your recollection and permit you to testify, if I suggested that the price that he paid was thirty-six thousand five hundred dollars?

A. If that is what was on the original document, yes.

Q. Do you know how much he sold those premises to Pfohl Brothers, Inc. for?

A. I believe that was also included in the documents.

Q. Yes. Do you know how much it was?

A. Not offhand, I couldn't be specific, but I could look.

Q. Now, would you do that for us while we do some of these other things?

MAGISTRATE MAXWELL: Is it here?

THE WITNESS: It's here.

MR. WEISS: It's so simple to bring the documents --

BY MR. FUZAK:

Q. All right, fine. Mrs. Muck, I also asked you on Thursday about computations relative to the claim for damages of two hundred and fifty thousand dollars set forth in paragraph twenty-nine of your complaint. I did not see any such papers on Friday. Did you locate any such papers relating to the computations of that damage figure?

A. No, sir.

Q. To your knowledge, are there any such papers?

A. Not in my hands.

Q. Do you know of any, in your hands or otherwise?

A. I don't know of any, I don't have any.

Q. Mrs. Muck, do you know whether or not at the time that this contract of May 17th, 1949 was negotiated and executed, whether or not Mr. Harold Kelly was acting as attorney for both of the parties to that contract, that is George C. Frey and Pfohl Brothers, Inc.?

A. I couldn't answer that question, Mr. Fuzak.

Q. Why?

A. Because I don't know.

Q. You just don't know? All right, fine. Thank you. That's all I would have of Mrs. Muck, your Honor.

Subject to these other papers.

MAGISTRATE MAXWELL: All right. Was there any reference made to this Pfohl contract? You asked about the sale price of the property --

MR. FUZAK: Yes, that we can--

MR. WEISS: You have the contract, why don't you just take it out?

MR. FUZAK: We'll do that. Put it on the record --

MAGISTRATE MAXWELL: You have the contract here?

MR. FUZAK: I have a copy, I believe, yes.

MAGISTRATE MAXWELL: Why don't we get rid of that portion of it right now, if we can?

MR. FUZAK: I'm going to withdraw those questions at this time because I think there are several parcels that might be involved.

MR. WEISS: No objection to the withdrawl, your Honor.

THE WITNESS: Mr. Fuzak?

MR. FUZAK: Yes?

MR. WEISS: Don't --

MAGISTRATE MAXWELL: Okay. Fine. Mrs. Huck, you are excused at this time subject to the --

your review or production of the documents as refer, I believe, to the question of the price lists. Whether or not there were any discounts other than the prompt payment discount utilized by the Plaintiff, percentages from those companies set out in the price list.

MR. WEISS: To prevent her or obviate the necessity of her returning with a letter, setting forth the schedule prices from 1970, which I think is that first date, to date.

MAGISTRATE MAXWELL: Well, let me ask you this. Are there books -- I understand the books are over at your office, Mr. Weiss. Is that right?

MR. WEISS: Pardon? No, those books, those are gravel purchase products, quite voluminous I imagine.

MAGISTRATE MAXWELL: Maybe she can find it out by telephone.

MR. WEISS: It's a different price each year, you see, there are two things to find out. One, not only they purchased, but did they

purchase for this plant rather than the other plant.

MAGISTRATE MAXWELL: That's right.

MR. WEISS: You have to find out which plant it went to.

MAGISTRATE MAXWELL: Is there any possibility of making the inquiry by telephone?

THE WITNESS: I can attempt to.

MAGISTRATE MAXWELL: Why don't you use our phone if you want to, or any other phone if you want, to see what you can find out in relation to those. Maybe we can have you testify so it won't be necessary for you to come back.

THE WITNESS: I'm planning to be here this afternoon.

MAGISTRATE MAXWELL: Well, she might be able to start doing it right now. If you want to use our phone, feel free.

MR. FUZAK: Your Honor, will this be an appropriate time to take an adjournment to permit Mr. Weiss to pick up the documents that we talked about?

MR. WEISS: Well, I can do that --

MAGISTRATE MAXWELL: Is there any possibility or starting on Mr. Frey? I understand Mr. Frey is going to be next. I have a plea at eleven-thirty and that's the normal pleading time, if I recall correctly, so let's go ahead for forty or forty-five mirutes. I'll take my plea and then Mr. Frey can come back. Mr. Frey. Mr. Frey, step up, please.

* * * * *

626-629 Liberty Bank Bldg.
Buffalo, N. Y. 14202
853-5600

STATEMENTS

EXAMINATIONS BEFORE TRIAL

DEPOSITIONS

CONFERENCE

CONVENTIONS

ARBITRATIONS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY, READY-MIXED CONCRETE, INC., et al,

Plaintiffs,

-vs-

PINE HILL CONCRETE MIX CORPORATION, et al,

Defendants.

Proceedings taken before the HONORABLE EDMUND F. MAXWELL, taken pursuant to notice at United States Courthouse Building, Buffalo, New York, taken on November 25, 1974, commencing at 10:50 A.M.

APPEARANCES: RAICHLE, BANNING, WEISS & HALPERN,
By ARNOLD WEISS, ESQ.,
10 Lafayette Square,
Buffalo, New York,
Appearing for the Plaintiffs.

ARNOLD WEISS
10 Lafayette Square
Buffalo, New York 14203

Jack W. Hunt C. S. R.
OFFICIAL SUPREME COURT REPORTER
& Associates

CERTIFIED SHORTHAND REPORTER
LICENSED BY THE
STATE OF NEW YORK
CERTIFICATE NO. 517

HODGSON, RUSS, ANDRES, WOODS & GOODYEAR,
By VICTOR T. FUZAK, ESQ.,
1800 One M & T Plaza,
Buffalo, New York,
Appearing for the Defendants.

MANZ, MANZ & DIVIAK,
By VICTOR E. MANZ, ESQ.,
425 Statler Hilton Hotel,
Buffalo, New York,
Appearing for the Defendants.

PRESENT: ADRIANNE TUSZYNSKI, Reporter.

H E R B E R T G. F R E Y, after being duly called and sworn, testified as follows:

MAGISTRATE MAXWELL: Give your full name, please, sir?

THE WITNESS: Herbert G. Frey, F-R-E-Y.

MAGISTRATE MAXWELL: Thank you, Mr. Frey. Be seated, please. Mr. Fuzak?

MR. FUZAK: Mr. Frey, first a few questions with reference to the operation of the Peppermint Road Batcher Plant during 1974. Am I correct that you maintain two bins to handle or hold gravel pending their -- the use of that gravel by that plant?

THE WITNESS: Yes.

MR. FUZAK: And, have you had those two bins

or those premises for sometime now, two separate bins?

MR. WEISS: Well, would you define -- your Honor, I think it's unclear by time.

MAGISTRATE MAXWELL: Well, all right. Set up the time.

DIRECT EXAMINATION BY MR. FUZAK:

Q. Have you had two bins that you have been using in connection with the operation at that plant for some ten years, at least ten years?

A. Yes. There's been two plants, yes.

Q. Two what

A. There's been two separate plants.

Q. No, I'm not talking about two separate plants, I'm talking now only about the Peppermint Road Batcher Plant?

A. Are you referring to, is that whole gravel and material?

Q. I'm referring to the two bins that you have at that Peppermint Road Plant?

A. Yes.

Q. In which you place gravel for use by that plant?
A. Yes, we have two separate gravel bins.
Q. And, you have had those two bins for quite a period of time, can you tell us how long?
A. No, I couldn't. It's been quite a while.
Q. Probably more than ten years, is that fair?
A. Yes.
Q. Now, during 1974, have -- has one of those bins been used for gravel received from Pine Hill Concrete and the other for gravel received from other concerns?
A. That's correct.
Q. In 1974, then I take it your -- the Plaintiff corporation has purchased gravel for use in the Peppermint Road Plant from other concerns than Pine Hill, is that right?
A. That is correct, sir.
Q. Can you tell us from what concerns the Plaintiff corporation has purchased gravel in 1974, for the Peppermint Road Plant?
A. In the concrete sand, we bought from Dar Gernett, we bought some from Frey.
Q. That's Frey Sand & Gravel, Corp.?

A. Yes.

Q. Thank you.

A. I think we have even brought in some from Franklinville Sand & Gravel.

Q. Any others that you can think of with reference to concrete sand during the 1974 year?

A. No, not offhand.

Q. Now, what about purchase of gravel for the Peppermint Road Plant during 1974, from companies or people other than Pine Hill?

A. We bought from Machias Sand & Gravel. Number one stone. We bought from Pine Hill the rest.

Q. And, when you --

A. In reference to gravel stone.

Q. And, when you say the rest, that means both number one and number two?

A. Yes.

Q. Did you buy from anyone else other than those two companies in 1974?

A. Offhand, I can't think of anybody that we did.

Q. Did I understand you to say that the corporation operates two batcher plants at this time, one at Peppermint Road and am I correct, the other one

at West Sereca at Union Road?

A. That's correct.

Q. And, does the Plaintiff corporation also own a third batcher plant?

A. No. You mean at different locations, sir?

Q. No. We have got one plant at Peppermint Road?

A. Yes.

Q. That the company is operating, correct?

A. Yes.

Q. And, one at West Seneca at Union Road that the company is operating?

A. Yes.

Q. Now, the question is whether there's a third batcher plant that the company owns?

A. No.

Q. Well, isn't there a plant that's located out there on -- at the intersection of Pavement and Peppermint Road that the company owns?

A. Well, in that gereral area, yes.

Q. Well, in other words, the company has three, does it not, not has three batcher plants?

A. In the Peppermint --

Q. One at Peppermint?

A. -- area?

Q. No. One at Peppermint Road?

A. Yes.

Q. The one that you are operating today with which this alleged contract is concerned, one at the intersection of Peppermint and Pavement Road, right?

A. I associate them as being one, but go ahead. You are right.

Q. They're two separate structures, is that correct?

A. That's right.

Q. And, they're not used together, are they? I mean, they're not used jointly with each other when they're used, is that right?

A. The only time we use the one up at the top of the hill is when we have a special request for some odd ball material, we have used it.

Q. All right. Now, how can we describe that one up at the top of the hill? Can we call it a -- do you have a name for it?

A. No.

Q. Can we call that one, at the intersection of Peppermint and Pavement Road, in order to distinguish it from the other one --

A. Why don't you refer to it as the garage plant? It's closer to the garage.

Q. All right. Now, the garage plant, as I understand it, is used for, as you call, odd ball items, right?

A. That's right.

Q. How far away from the Peppermint Road Batcher Plant is the garage batcher plant?

A. In mileage, I'd say probably within a quarter of a mile. That's a guess.

Q. All right. And, when -- when was that garage batcher plant constructed?

A. I actually don't remember, Mr. Fuzak. I'd have to look.

Q. Can you give me any indication, was it within the last five years, do you know?

A. No, it's been up longer than that.

Q. Would you say that it was sometime between the last five and last ten years, within that period?

A. I couldn't be accurate, but I'd say it would be closer to the ten year.

Q. All right. And, what was the cost of that plant, the construction of that cost -- plant, Mr. Frey?

MR. WEISS: I object to the question, I see no

relevancy to that, no materiality, no indication how that could lead to anything which could become relevant.

MAGISTRATE MAXWELL: Your objection's noted. You can answer, Mr. Frey?

THE WITNESS: I really don't know, Mr. Fuzak.

BY MR. FUZAK:

Q. Do you have any idea in mind at all as to what the cost of that plant was?

A. No more.

Q. Would your corporate books indicate what the cost of construction of that plant was?

A. I'd have to assume they would.

Q. May I request that we also obtain that information for the record at the same time that we're obtaining this other information, please? Can we do that?

MR. WEISS: Well, I don't know if we can do it. At the same time, sometime, reasonable time in the future we can get you this material.

MAGISTRATE MAXWELL: Well, check it out and see what you can do at this particular --

MR. WEISS: I'm sure we can't do it on lunch hour.

THE WITNESS: I don't think it can be done that quick.

I personally have to go through and pick that out. It was built over a long period of time. Different things were depreciated at different times.

MAGISTRATE MAXWELL: Was there an initial outlay for money and then additions as you went along?

THE WITNESS: There was more than one plant bought in the same year. Came in on the same shipment, it just can't be done quick.

MAGISTRATE MAXWELL: You do the best you can. If you can come out with an additional outlay in the beginning, fine.

MR. WEISS: We'll do the best we can, your Honor. I just don't think we should be held to this afternoon.

MAGISTRATE MAXWELL: I'm not going to hold you. If you can, fine. If you can't, do the best you can.

BY MR. FUZAK:

Q. Is that garage batcher plant located on land owned by the corporation?

A. No.

Q. Is it located on land leased by the corporation?

A. Yes.

Q. From whom does the corporation lease that land?

A. From my mother.

Q. And, do you know what the terms of the lease is?

A. No, I do not.

Q. When you say that the plant has been used for essentially odd ball items, how much use does that entail during the course of say 1974? How much use did that result in?

MR. WEISS: You mean how many dollars?

BY MR. FUZAK:

Q. Whatever. However he can measure it.

A. I don't believe 1974 we used it more than possibly a week.

Q. And, was it different in 1973? Did you use it about the same amount of time in 1973 or did you use it more or less?

A. It's either the '73 or '72, we used it quite a bit. I mean, more than one week.

Q. Can you give me how much you used it in those two years, to your recollection?

A. Probably as much as a month and a half, two months.

I'm not sure which year.

Q. And, the other of the two years, whichever you didn't use it a month and a half or two months, was it used approximately the same amount of time as it was in 1974, about a week?

A. Same quantities, yes.

Q. Mr. Frey, that garage batcher plant is, I take it, carried on your corporate books as an asset?

A. I would assume it is.

Q. And, am I correct, it is also depreciated on a regular basis, the depreciation is taken with respect to that particular garage batcher plant?

A. I'd have to assume that's correct, I don't know, sir.

Q. Mr. Frey, before your father's death, Mr. George C. Frey, was he personally engaged in the Ready-Mixed business for his own personal account as distinguished from being an officer or director of Frey Corporation? In other words, did he have a personal business of his own in the Ready-Mixed business?

A. I fail to follow your question.

Q. Well, during some period of time before his death,

was your father personally for his own account, and not for the benefit of some corporation, involved in the Ready-Mixed business?

MR. WEISS: Do you mean at 1949 when he entered this agreement?

MR. FUZAK: During the period of time. There's been some testimony about Mr. George Frey's activity going back, I gather, to 1945.

MR. WEISS: Well, 1949 he entered into this agreement individually. I don't know if that's what you mean or just before his death.

MAGISTRATE MAXWELL: Well, did he operate or participate in a Ready-Mixed in his own name?

MR. WEISS: Your Honor, is it years before or recently --

MAGISTRATE MAXWELL: All right. From 1945 until his death?

MR. FUZAK: Do you follow my question, Mr. Frey?

THE WITNESS: I'm completely lost.

MR. FUZAK: All right. What I'm asking you is, whether to your knowledge, from 1945 to his death, your father, George C. Frey was

at any time, personally, individually engaged in the Ready-Mixed business?

THE WITNESS: Prior to incorporation, he would have been.

MR. WEISS: This was covered on the first day of the deposition, your Honor, March 5, 1973 on page four.

MAGISTRATE MAXWELL: All right. If he can answer it anyway, we have had very little repetition so far, and I hope -- practically no more.

MR. WEISS: I'll tell him where it is if he tells me what he wants.

MAGISTRATE MAXWELL: Well --

MR. FUZAK: Thank you, Mr. Weiss. Mr. Frey, did you have an answer to that question?

THE WITNESS: I believe I did.

MR. FUZAK: Yes, what was it? I didn't hear it, I'm sorry.

THE WITNESS: Did you get it?

MAGISTRATE MAXWELL: I think he said prior to the incorporation, Mr. Frey was operating personally. Is that right?

THE WITNESS: Yes, he owned it personally, yes.

MR. FUZAK: And, was Mr. Frey personally engaged at any time during that period in the production and sale of gravel?

MR. WEISS: You mean before he incorporated?

MR. FUZAK: No.

MR. WEISS: When you say that time?

BY MR. FUZAK:

Q. I'm saying from 1945 till the time of his death, I'm asking whether or not he was personally and individually for his own individual account, engaged in the business of selling, producing and selling concrete sand?

A. You imply personally?

Q. Yes, I'm asking personally?

A. The sand and gravel business, I believe when it was incorporated -- it was incorporated when it was started. I don't believe he ever handled that on a personal basis at any time.

Q. And, what was that corporation?

A. Frey Sand & Gravel.

Q. When was it incorporated?

A. I couldn't tell you.

Q. Is the same true with respect to the producing and

selling of con -- of crushed stone by your father?

A. He never sold crushed stone.

Q. He never sold crushed stone. Did he ever sell for his personal account and for his individual business, any gravel?

MR. WEISS: He just covered that -- oh, you said produce this --

MR. FUZAK: No. I said before we were talking about concrete sand.

THE WITNESS: Would you read that question back?

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: I'd have to say on a personal basis, he has owned gravel. At times he -- when Pfohl Brothers started out, they had gravel but he bought gravel and sold it to him many times. He done a lot of negotiating for Pfohl Brothers. All -- because at that time, there was good harmony and they worked together and good co-operation to maintain good relationships, and he used to go out and do the negotiating for different pieces of property that Pfohl Brothers eventually

had. He bought quite a little of the property and sold it to Pfohls. A lot of times he negotiated for, sometimes they had some in partnership.

BY MR. FUZAK:

Q. In other words, over the years, are you saying that your father personally bought quite a little bit of gravel property and then sold it to the Pfohls?

A. That's correct.

Q. Also you are saying that over the years, your father actually negotiated some deals with reference to gravel property for the Pfohls, is that right?

A. That's correct.

Q. Do you know what the arrangements were, if any, between the Pfohls and your father in connection with his negotiating for them as you just said?

A. Written arrangements?

Q. Whatever arrangements, if you know any?

A. There was no written arrangements. There was just -- well, just good harmony I would say, gentleman's understanding, that kind of stuff. Nothing that had to be put on paper.

Q. Can you tell us whether to your knowledge, either

Frey Ready-Mixed Concrete, Inc., or George C. Frey Batching Plant, Inc. were ever in competition with Pfohl Brothers, Inc.?

A. No way.

Q. They were not in competition at any time?

A. No. It explicitly states that it cannot be in our agreement.

Q. I'm sorry, I didn't catch the last --

A. It explicitly states that it cannot be in that agreement.

Q. You are now referring to the contract of May 17th, 1949, which you refer to in your complaint?

A. That's right.

Q. And, you are stating in your agreement it explicitly states those corporations cannot be engaged in competition with Pfohl Brothers, Inc.?

A. That's correct. And, vice-versa.

Q. Mr. Frey, has the Plaintiff corporation used crushed stone as the aggregate for Ready-Mixed Concrete which it produces?

MR. WEISS: Your Honor, this was covered at previous depositions.

MAGISTRATE MAXWELL: I will allow him to answer.

THE WITNESS: Yes.

BY MR. FUZAK:

Q. Do you know what Clarence Sand & Gravel, Inc. uses for its Ready-Mixed, as the aggregate, whether it uses gravel or crushed stone?

A. I believe they use both.

Q. Is it possible to use both? Can you in effect select which one you want to use in production of Ready-Mixed Concrete?

A. Not normally.

Q. Well, can you tell me under what circumstances it is?

A. You have spec concrete that requires crushed stone, or you may have some that's -- specs out crushed gravel. You may have it spec'd out as round gravel.

Q. Do --

MR. WEISS: I don't know if he's finished, Mr. --

MR. FUZAK: I'm sorry, go ahead.

MR. WEISS: Were you finished with your listing?

THE WITNESS: Yes.

MR. WEISS: I'm sorry.

MR. FUZAK: Do the orders which your company receives, and let's take 1974, do they normally

specify which aggregate must be used, whether it be crushed stone or gravel?

MR. WEISS: Your Honor, this subject was also gone into in detail in the previous depositions.

MR. FUZAK: Not in 1974, that's not possible.

MAGISTRATE MAXWELL: All right. I'll allow him to answer it.

MR. WEISS: So the question is, in 1974 do the customers specify aggregate?

MR. FUZAK: That's right.

THE WITNESS: Would you read the question back?

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: Just the way the question is worded, makes it quite difficult to answer. I'll answer it two ways. Some cases yes, some cases our design mixes where the customer really has nothing to do and -- the spec, some design engineer has made that request. And, a lot of times the labs put together what they want in it. And, we merely fill the orders, but there are many cases where the customer does call and ask for -- for

what he wants.

MR. FUZAK: Now, am I correct that in your -- well, let me rephrase that. In your experience in this business, isn't it correct that the vast majority of orders which your company receives do not specify what aggregate must be contained in the Ready-Mixed, whether it be crushed stone or gravel?

MR. WEISS: Your Honor, my recollection is this was all covered --

MAGISTRATE MAXWELL: All right, I'll allow him to answer.

THE WITNESS: I don't believe we did have many orders of something that is specified definitely.

BY MR. FUZAK:

Q. You mean something in terms of which aggregate to use, whether it be crushed stone or gravel?

A. I don't think normally when we even answer our phone, we usually ask the customer what he wants and whether he wants gravel or he wants crushed stone, that's it. If it's an open order. If it's a spec job on -- that we already got the formula from a design lab, we usually follow that. This is

pretty much standard throughout the industry, whether it's our business or somebody else's.

Q. Since 1970, Mr. Frey, has the Plaintiff corporation made any efforts to purchase gravel from Clarence Sand & Gravel, Inc.?

A. No. It would be futile attempt, These people buy their gravel, a good percentage of their gravel themselves from outside sources. I know they buy crushed stone from outside sources. I know there's a good percentage of the gravel is bought not from their own source because they're fundamentally very low.

Q. Does Clarence Sand & Gravel have a gravel pit and a washer plant?

A. Yes, they do.

Q. Mr. Frey, I asked your sister, Mrs. Muck, about any conversations that any representatives of corporations had had with representatives of Buffalo Gravel Corp. in connection with taking over any jobs of that company since its discontinued business. Have you had any such conversations or discussions?

MR. WEISS: Why, I think Mr. Fuzak misspoke, your

Honor, in the question.

MAGISTRATE MAXWELL: In what respect?

MR. WEISS: In the name of the company.

MAGISTRATE MAXWELL: Well, where, Mr. Weiss?

BY MR. FUZAK:

Q. Buffalo Slag Company, is that it? Using it -- Buffalo Slag Company, you understand what I mean, do you?

A. No.

Q. Have you had any conversation, you yourself or do you know of any conversations between any representative of your corporation and Buffalo Slag Company, with reference to your company taking over their jobs?

A. No.

Q. Is your company involved in finishing certain of the jobs of Buffalo Slag Company?

A. No.

Q. What about the Bethlehem Steel job? Isn't your company involved in that, in having taken that over from Buffalo Slag Company?

A. We're supplying concrete to the Bethlehem Steel job, job, yes. Nothing to do with the Buffalo Slag

Corporation.

Q. Mr. Frey, can you tell us how many jobs the Plaintiff corporation is presently doing which were originally started by Buffalo Slag Company?

A. I don't believe I could. I'd have to go back and see if our salesmen knew. I know of only a couple that I'm sure of.

Q. Well, Mr. Burg testified to -- some while you were here, did he not?

A. I believe he did.

Q. Can you give us your best recollection of how many and what they are?

A. Well, only ones that are vivid to my mind are the one that John W. Cowper had with Bethlehem Steel Company. Jesus, maybe -- there's more, but I'm sure -- they just don't come to my mind right away. Oh, there was one with Elia, I believe. I believe it's over on Route 98. I'm sorry, 198, what they call the Scajaquada Creek Expressway. That's all I can recollect offhand.

Q. All right. Is Frey Sand & Gravel, Inc. still in existence? In other words, it was not merged into Frey Concrete, Inc. I understand?

A. There is no connection.

Q. All right. To your knowledge, Mr. Frey, was Pfohl Brothers, Inc. given written notice or the opportunity of Pfohl Brothers, Inc. to operate the Alexander Gravel properties which Frey Sand & Gravel, Inc. owns?

MR. WEISS: Now, that your Honor calls for a -- it's a very complicated question. It's a question whether they had to be given full, and what does full notice mean?

MR. FUZAK: No, no. I didn't say full. I said written notice.

MR. WEISS: Well --

MAGISTRATE MAXWELL: If you are able to answer, Mr. Frey, please --

MR. WEISS: Could you repeat the question, please, your Honor?

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: No, they were given no written notice in the first place and our contract did state anything in the County of Erie. The County of Erie, we cannot participate in or we could

not own our gravel washing plant or sell gravel in competition. This is out of the County of Erie.

BY MR. FUZAK:

Q. Alexander is, you mean?

A. Yes, it is.

Q. Now, what about -- did your father own gravel property at Peters Corners Road?

A. No.

Q. Who did?

A. I did and -- I believe my sister and I think my mother.

Q. And, did -- did you or your sister or your mother give any written notice to Pfohl Brothers, Inc. affording Pfohl Brothers, Inc. the opportunity to use that property for gravel purposes?

A. No, we did not. We gave -- I personally stopped in andseen Bob Jones and I told Bob, I said we got that chunk of property out there, and we have an opportunity to sell it. And, Bob says he'd look into it. And, later he reported back, they had no interest in it.

Q. When you make reference to Bob Jones, that's an

employee of Pine Hill Concrete?

A. Yes. By the way, on that same question, I had told him there was some pretty nice gravel in there, and he didn't even have any interest in looking at it.

Q. What did you finally do with that property?

A. Sold it to Clarence.

Q. Clarence Sand & Gravel, is that --

A. Yes.

Q. Now, you mentioned earlier that your father, George C. Frey, worked together with the Pfohls with reference to the acquisition of various gravel properties?

A. That's correct.

Q. Over the years. In your affidavit that you filed with the Court on May 13th, 1971 --

MR. WEISS: Could you hold on a minute, please?

BY MR. FUZAK:

Q. Sure. At page three, I'm just going to -- I'll say the question, you may not need to look at it. You make reference to that situation and you say that your father, who down through the years worked together with Pfohls to acquire and finance these gravel sources. What was done by your father to

finance the gravel sources that Pfohl required down through the years?

A. Well, sometimes you -- you would have to be a part of it at the time. It went fast and furious there for a short time, where most of these lands were bought and negotiated for. They would lack funds and he'd participate in -- I don't know just how he did it, I just kind of remember, he used to help them financially with it and otherwise. A lot of times they would get themselves in a boat where they couldn't talk with a farmer and then my father would take a whack at it and sometimes he'd get it.

MAGISTRATE MAXWELL: Here, you want this?

MR. WEISS: I have it here, I don't know the paragraph, thank you. Vic, what paragraph are you in, there?

MR. FUZAK: I'm sorry, that's the very bottom of page three, paragraph seven.

MR. WEISS: Okay. Thank you.

MR. FUZAK: And, I'm very sorry, could you read back Mr. Frey's answer? We got shuffling papers here --

(Whereupon, the above-requested testimony

was then read back by the reporter.)

MR. WEISS: Did you want to say something more?

THE WITNESS: Well, this is all done, not only because it helped Pfohls, but also it helped us. And, at that time Clarence used to try and buy some stuff -- oh, Buffalo Sand, after -- they were a little bit slow, but they used to come along then, too. They wanted to buy a chunk, but sometimes speed was the essence, and in many of these negotiations, and my father finally tried to help Pfohl at that time to get quite a little property under his belt.

BY MR. FUZAK:

Q. And, am I correct too, that your father also made some purchases of gravel property?

A. Later they were all, eventually consummated and sold to Pfohl. By the way, one of the last ones that I remember, my father forgot about it too, but they owned it in partnership with Pfohl and Pine Hill came and dug it out, Pa went over and looked at it and says gee, I own a chunk of that. He had to go and negotiate a deal. In other words,

Pine Hill cleaned it out -- it was just a mistake and an accident.

Q. Where was that?

A. On Cleveland and Dutwyer.

Q. On the Dutwyer Farm?

A. Yes.

Q. Mention of that was made previous from this examination.

A. Gee, I don't know. It was of little importance except we did work together.

Q. Did your father -- did your father in connection with his activities, related to the acquisition of gravel properties, he used a man who went by the name of Reno, or nickname of Reno?

A. Not -- he did that in Alexander. This man in fact located most of the -- I shouldn't say located, got us started in the gravel in Alexander. Reno Rodriguez, I think his name was.

Q. Reno Rodriguez?

A. Yes.

Q. Thank you.

A. A lot of -- Rodogaro, Rodogaro, I'm not sure of the spelling.

Q. That's the last name?

A. Yes.

Q. Has the Plaintiff corporation purchased any concrete, sand or grit from Pine Hill during 1974?

MR. WEISS: You know, your Honor --

THE WITNESS: I don't remember any.

MR. WEISS: -- if there's anyone that would know that, it is Pine Hill.

MAGISTRATE MAXWELL: Mr. Frey will also.

THE WITNESS: I don't believe so. I'd have to check to be real factual, but I don't believe so.

MR. FUZAK: Now, with reference to the operation of your West Seneca-Union Road Plant, which produces Ready-Mixed Concrete, does that plant service the general Greater Buffalo area as your sister described it in her testimony?

THE WITNESS: I believe, that's right.

MAGISTRATE MAXWELL: I'd like to take a break Mr. Fuzak, if you have any other questions you want to tie up that might --

MR. FUZAK: No, that's all right. We can stop now.

MAGISTRATE MAXWELL: You want to stop now? All right.

It may be about a twenty minute break. I have some other matters that I have to handle. So, possibly Mr. Weiss, you might be able to get those records during the break.

MR. WEISS: Well, is your Honor going to take a luncheon break?

MAGISTRATE MAXWELL: Probably not until one or one-thirty.

MR. WEISS: And, then for how long will that be?

MAGISTRATE MAXWELL: Oh half an hour, forty-five minutes.

MR. WEISS: That long?

MR. FUZAK: I think it might be better if we could attend to these documents over this break, rather than waiting until later.

MAGISTRATE MAXWELL: Well, that's what I'm -- all right. Do you want to break from now until one o'clock? Take your lunch and look at the documents all at the same time, get your documents and have lunch at the same time?

MR. WEISS: Well, the documents -- I have only four documents that I have to locate. That's

not a hard problem, but the answers to these questions that he asked may or may not be available, but --

MAGISTRATE MAXWELL: All right, let's do it this way. Why don't you bring those documents over to me --

MR. FUZAK: Excuse me, I'm sorry.

MAGISTRATE MAXWELL: What else -- as I understand it, there's four documents to be examined. The original of the corporate files to be produced for the purpose of marking it, and then Mrs. Muck is going to try and check records possibly by phone, if not,as she's able --

MR. WEISS: I think that's something -- we can't do that on a break right now, your Honor.

MAGISTRATE MAXWELL: Let's take a twenty minute break. You bring those four documents over, then continue the examination of Mr. Frey and when we recess for lunch, I'l try and look at those documents and make a determination. Let's recess until about noon.

(Whereupon, at 11:35 A.M. a recess was then

taken.)

(Proceedings commencing after recess at 12:25 P.M. Appearances same as before noted.)

MAGISTRATE MAXWELL: Back on the record.

MR. WEISS: Your Honor, during the recess, I procured copies of a listing showing the list prices and the net -- net prices to Frey, from its various gravel and grit suppliers from 1967 to date, and I hand a copy of that to Mr. Fuzak.

MR. FUZAK: Thank you.

MR. WEISS: If your Honor wants a copy of that, I have one.

MAGISTRATE MAXWELL: Why don't we mark that? Mark the original.

MR. FUZAK: Sure.

MAGISTRATE MAXWELL: You people figure out what the designation should be.

MR. FUZAK: Exhibit AE I believe.

MAGISTRATE MAXWELL: AD?

MR. FUZAK: AE.

MR. WEISS: AE.

MR. FUZAK: Yes. And, the title of this sheet I have just been handed, is comparison of Frey's grit and gravel prices.

MR. WEISS: It's my impression that the original of this exhibit has been marked before Judge Curtin during a hearing in October, I believe.

MR. FUZAK: October 16th was the date of the hearing.

MAGISTRATE MAXWELL: Oh, all right. Mark this as AE. If there's any confusion -- this purports to be a copy of an exhibit which was previously marked before Judge Curtin, all right.

(Whereupon, a document was then received and marked Defendant's Exhibit AE for identification.)

MR. WEISS: Now, I'll hand your Honor Court Exhibits, three letters from attorneys for the Freys, which were in the papers I believe of what is called the corporation file.

MAGISTRATE MAXWELL: I'd like you to mark them as Court Exhibits 1, 2 and 3, please?

(Whereupon, three documents were then received and marked Court Exhibits numbers 1, 2 and 3

for identification.)

MR. WEISS: In addition, I have here a four page document which I assume you would like this to be marked as Court Exhibit number 4?

MAGISTRATE MAXWELL: Right.

MR. WEISS: Which I believe came from the personal file that Mrs. Muck referred to.

(Whereupon, a document was then received and marked Court Exhibit number 4 for identification.)

MR. WEISS: During the recess, your Honor, I took the liberty of reviewing Exhibit 4, which I'll now hand you, and Xeroxed from that, those portions which it is our contention, do not contain or relate to privileged matters. I don't know if that will be any help to you.

MAGISTRATE MAXWELL: Why don't you do it that way, do I understand then some portion of this you feel is not privileged?

MR. WEISS: Yes.

MAGISTRATE MAXWELL: All right.

MR. WEISS: So, I have Xeroxed those portions and

we could mark it 4-A, if you like.

MAGISTRATE MAXWELL: Why don't we mark it 4 and 4-A, and give to Mr. Fuzak a copy of 4-A which is the non -- which you claim it is the non privileged portion of it.

(Whereupon, a document was then received and marked Court Exhibit number 4-A for identification.)

MR. WEISS: I now hand your Honor, Exhibits 1 through 4-A.

MAGISTRATE MAXWELL: All right. What I'd like to do, we back on? Is continue with the examination of Mr. Frey and then on its completion, I'll take a quick look at these things and see if we should recess for lunch and go over more, if I can make a determination at that time.

BY MR. FUZAK:

Q. Fine, your Honor. Mr. Frey, did you personally have any part in the discussions or negotiations which led up to the contract of May 17th, 1949 between your father and Pfohl Brothers, Inc.?

A. I was there. No, I don't remember anything in

particular about it.

Q. You have no recollection of any conversations that dealt with this subject of the contract of May 17th, 1949 before it was signed?

A. Everything I have would be real vague.

Q. Well, as vague, can you give us whatever you have in your mind, if anything or --

A. I don't.

Q. You don't have anything in your mind, all right. Did you at any time, either before that contract was signed or after that contract was signed have any conversations with Mr. Harold Kelly concerning the contract?

MR. WEISS: That calls for a yes or no answer, please.

MAGISTRATE MAXWELL: Yes. You can answer yes or no, Mr. Frey?

THE WITNESS: I'm unable to answer because I don't remember -- I don't believe I -- I did participate in anything that Kelly was involved with -- in.

BY MR. FUZAK:

Q. All right.

A. I don't believe so.
Q. Did you participate in any conversations with the Pfohl Brothers, concerning performance of that contract of May 17th, 1949?
A. Yes.
Q. Can you tell us when?
A. The date I do not know.
Q. Can you tell us the year?
A. No.
Q. Was this one conversation?
A. One in particular, there was a -- I believe my mother, father and sister were over in Pfohl's office. That was the only one I think I remember, and I don't remember what date it was.
Q. You don't have any idea of what year it might have been or approximate year?
A. No, I could find out and I don't have it.
Q. And, what did that conversation have reference to?
A. We had built a -- operating batch plant on another portion of the property and Pfohl wanted us to take it off and -- he wanted us to remove it, so as to curtail our operation of expansion.
Q. Excuse me, Mr. Frey. When you say on another part

of the premises, you mean the premises that were covered by the May 17th, 1949 contract?

A. In the Peppermint Road pit, not in the leased area.

Q. I see. And, this -- this other plant that you say you had built, was that on property that was then owned by Pfohl Brothers, Inc.?

A. Yes, it was then owned by Pfohls.

Q. That's not the garage batcher plant that we have been talking about?

A. No.

Q. Something separate and distinct?

A. Right.

Q. And, what happened with reference to that particular plant?

A. We took it off.

Q. Anything else that you can recollect, any other conversations?

A. Not individually, no.

Q. Well, whether individually or otherwise, can you recollect any other conversations?

A. I remember conversations of -- of -- when negotiations were taking place on prices.

Q. As between your father and the Pfohl Brothers, Inc.?

A. Yes, but you are trying to ask me on definite dates, and I can't.

Q. Okay. Can you recall the substance of any of those conversations, what was said by the parties?

A. No.

Q. Did you at any time make any notes or memoranda or any writings concerning any of these meetings?

A. No.

Q. Did your mother play a role of any kind in these discussions that were had during the negotiation of the May 17th, 1949 contract, that you know of?

MR. WEISS: I object-- object your Honor. It's not clear what play a role means.

BY MR. FUZAK:

Q. Well, did she participate?

A. I couldn't answer that. I don't believe so, but accurately I could not answer it.

Q. Do you know, Mr. Frey, whether or not Mr. Harold Kelly represented both your father George C. Frey and Pfohl Brothers, Inc. at the time that this May 17th, 1949 contract was executed in connection with that contract?

A. I do not know that answer. I know he represented us

and I believe -- I believe he was paid by us, but I don't believe he would have represented Pfohls, but he might have. If he did, I'm unaware of it.

Q. All right. Do you know any of -- whether any other attorneys were involved in connection with the negotiations and preparation of that contract of May 17th, 1949?

A. I don't believe so.

Q. To your knowledge, Mr. Frey, did you or any of the other Plaintiffs in this action make any objection to Pine Hill at the time, that Pine Hill purchased the Pfohl Plant in 1957?

MR. WEISS: Could you repeat the question, please I'm sorry.

MR. FUZAK: Yes. Would you read it back to him?

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: I don't believe we did. We didn't have anybody to complain to at this point. Pine Hill I believe was interested in buying all the gravel sources in the whole area that was remaining, except possibly what Clarence had.

BY MR. FUZAK:

Q. My question is -- let me put it this way to you?

A. We had nobody to complain to.

Q. At the time in 1957, when Pine Hill purchased the Pfohl Plant --

A. Yes?

Q. -- you and the other Plaintiffs were aware of that fact, were you not?

A. We were sent a letter, I believe.

Q. Yes. And, my --

A. Now, wait a minute, I don't know what year that letter came, whether it was '57 or '58. We were sent a letter by Pine Hill.

Q. Excuse me, go ahead.

A. That's all.

Q. Either in 1957 or 1958 is your recollection?

A. One of them times we was notified that Pine Hill owned it.

Q. All right. Now, my question is, at that time or after that time, you or any of the Plaintiffs objected to Pine Hill for the purchase of the Pfohl Plant?

MR. WEISS: You mean aside from this lawsuit?

BY MR. FUZAK:

Q. Aside from this lawsuit which was commenced in June of 1970?

A. I don't know who we could have complained to.

Q. No, I'm sorry. Regardless of who you could have complained to, my question is, any of your Plaintiffs complained to Pine Hill about that purchase?

A. I don't believe we did.

Q. Mr. Frey, has Frey Concrete, Inc. or the predecessor corporations, purchased any mixers in the last four years since 1970, mixer truck?

A. Yes.

MR. WEISS: Your Honor, this was covered on previous occasions, both in Court and also in depositions.

MR. FUZAK: It wasn't covered in Court because Mr. Frey didn't testify in Court.

MAGISTRATE MAXWELL: Well, let him answer. If you are able to answer it, Mr. Frey?

THE WITNESS: Yes.

MR. FUZAK: How many mixers have you purchased -- has the corporation purchased since 1970?

THE WITNESS: Twelve.

MR. FUZAK: And, could you describe those twelve mixers, what they are?

MR. WEISS: Your Honor, this was covered in great detail on previous depositions.

MAGISTRATE MAXWELL: Well, I'm going to allow it at this particular time. I don't think it's delaying too much.

MR. WEISS: My stomach also notes an objection.

MAGISTRATE MAXWELL: I'm looking at your stomach, Mr. Weiss. I don't chink the objection is valid.

MR. FUZAK: Mr. Frey, could you describe those twelve mixers that you just mentioned?

THE WITNESS: Yes. The Crane Karrior Corporation, K-A-R-R-I-O-R, and they got Rex mixers.

MR. FUZAK: And, how large are those trucks?

MR. WEISS: Your Honor, this is all covered in previous --

MR. FUZAK: Well, if Mr. Weiss would just let me ask these few questions, he'd save a lot of time.

MAGISTRATE MAXWELL: I'm assuming he, Mr. Fuzak, does not either recollect fully or is leading to

something else at this time.

MR. WEISS: Mr. Fuzak recollects everything, your Honor.

MR. FUZAK: Thank you, Mr. Weiss. With respect to yardage capacity?

THE WITNESS: Eight of them are twelve yards ratted, R-A-T-T-E-D and four of them are ten yard ratted.

MR. FUZAK: Now, can you tell us the purchase price for the twelve yard ratted trucks?

MR. WEISS: Your Honor, I think this is a competitive circumstance and I object to it. These people are in direct -- these people do not have these trucks, apparently they're envious of these trucks.

MAGISTRATE MAXWELL: Well, if it is a question of competition, I would assume the expenses of operating may have some bearing on it, Mr. Weiss. I'm going to allow the question over your objection.

THE WITNESS: I believe the twelve yarders were about fifty-one thousand, somewhere in there. Complete, mixer and truck.

MR. FUZAK: And, the ten yard ratted ones?

THE WITNESS: I believe they're around forty-five.

MR. FUZAK: And, how did the company finance the purchase of those trucks?

THE WITNESS: Manufacturers & Traders Trust Company.

MR. FUZAK: You borrowed all of the money required for the purchase of those trucks?

MR. WEISS: Your Honor, again, how could that possibly be relevant to this lawsuit, whether they borrowed all of it or ninety percent? These are two competitors and they're competing very heavily,at least Frey is trying to keep afloat.

MAGISTRATE MAXWELL: How is it relevant, Mr. -- as to the method of financing?

MR. FUZAK: Your Honor, Mr. Weiss and Mr. Frey and Mrs. Muck, I would say on more than a half dozen occasions each, made representations to the Court concerning alleged losses in the operation of this corporation. And, I think this has relevance to those assertions. They apparently take the position that the losses they are complaining of is the direct

result of competition. Our position is quite to the contrary. It might have something to do and probably does, with respect to the operation of the company.

MAGISTRATE MAXWELL: I'll let him answer, Mr. Frey, of course subject to the --

MR. WEISS: I'm not arguing with your Honor and I'll go along with your ruling. I'm only saying what he has said wouldn't affect the loss whether they borrowed all of it or ninety percent.

MAGISTRATE MAXWELL: You may answer over objection, Mr. Frey.

THE WITNESS: Now, after all the bickering, I got to find out what the question was.

MR. FUZAK: My question was, whether or not the corporation borrowed all of the money from the M & T required for the purchase of these twelve mixer trucks that we are talking about?

THE WITNESS: I don't believe we borrowed all the money for the first batch.

MR. FUZAK: Where did the money come from that you

didn't borrow?

MR. WEISS: Your Honor, well does that -- is this getting into -- I object to this, personal matters where did the money come from. It might have come from his son's savings account or --

MR. FUZAK: It might very well have. I think it's entirely relevant.

MAGISTRATE MAXWELL: Well, why don't you ask if the corporation put some money down?

MR. FUZAK: Did the corporation put some money down toward the purchase of these mixer trucks?

THE WITNESS: Yes.

MR. FUZAK: And, was it the corporation's funds that were used for that purchase, or were they borrowed funds?

THE WITNESS: Corporation funds.

MR. FUZAK: Now, has the corporation experienced any restrictions with respect to the use of the twelve yard mixer trucks in terms of -- in terms of the usage of the highways in this area?

MR. WEISS: Your Honor, this was covered I think

most of an afternoon was spent on this subject. I would like to be refreshed, but I have the depositions here. The whole thing was gone over and it was expressly understood by your Honor and by Judge Curtin, I think your Honor stated it, this was not an attempt to get different answers to the same --

MAGISTRATE MAXWELL: No, I don't think it is. Did you handle the deposition involving --

MR. FUZAK: No, I did not before this time. I think Mr. Manz refreshed my recollection, one of the problems was in connection with this whole line of questioning by Mr. Manz in previous EBT's, Mr. Weiss was placing a number of objections on the record and I believe also instructed the witness not to answer certain questions with respect to this matter.

MR. WEISS: I'll show you --

MAGISTRATE MAXWELL: I don't think that there's going to be any great detriment if this question is answered at this particular time. If Mr. Frey is in a position to recollect the

answer. So, I'm going to allow it over the objection of Mr. Weiss.

THE WITNESS: What was the question?

MR. FUZAK: The question -- I'll restate it. The question was, whether or not the Plaintiff corporations had experienced any restrictions with reference to the use of the twelve yard mixer trucks?

MR. WEISS: Restrictions from whom? I don't think that's clear.

MR. FUZAK: If I had an opportunity to finish the question --

MAGISTRATE MAXWELL: Finish your question, then see if Mr. Frey understands.

BY MR. FUZAK:

Q. Mr. Frey -- let me start, then we'll go little by little, Mr. Weiss. Mr. Frey, has the corporations experienced any difficulties with any Governmental authority concerning the use of these twelve yard mixer trucks on the highways in this area?

A. No.

Q. Has the corporation received any summons for the use of over weight trucks in these -- any one of these

twelve yard trucks?

MR. WEISS: Again I object to this. It was -- exactly the same question was asked.

MAGISTRATE MAXWELL: Answer it, Mr. Frey, if you can.

THE WITNESS: May I ask, has Pine Hill received anything --

MAGISTRATE MAXWELL: Mr. Frey, if you can just answer the question as it relates to your trucks.

THE WITNESS: Yes.

BY MR. FUZAK:

Q. You have received summons?

A. Some fines, yes.

Q. And, you have had fines, have you?

A. Yes.

Q. And, do they relate to the twelve yard trucks?

A. Not particular.

Q. What do they relate to?

A. Nothing to do with the twelve yard truck.

Q. You received no summons with reference to the operation of the twelve yard trucks?

A. None whatsoever.

Q. Have you been prohibited by any Governmental authority at any time from operating those twelve

yard trucks on the highways in this area?

A. None whatsoever.

Q. Mr. Frey, in your affidavit which you filed here, on October 24, 1974, page eight, paragraph twenty-six --

MR. WEISS: If you please give me an opportunity -- what paragraph?

BY MR. FUZAK:

Q. Paragraph twenty-six, page eight. In that paragraph, and I'm not going to read the whole thing, but you are discussing the price of wall concrete and you state there, "Our price as of April 1 was twenty-three dollars and seventy cents per yard," close quote. That I take it is April 1, 1974 that you make reference to, is that right?

A. I believe that's correct.

Q. Now, is that twenty-three dollars and seventy cents price that you refer to there, a fixed price charged by the corporation at all times to all customers since April 1, 1974?

A. All our wall customers. W-A-L-L.

Q. You were saying, I'm sorry?

A. To elaborate on it just a little, there was only

one exception and that was a carry-over job that was handled by CBS and he informed us that he can now get the concrete for twenty-two dollars from Pine Hill, and I suggested to him it didn't make any difference to him, to go ahead and get it there.

Q. Well, what does that mean, one exception? You mean you charged CBS something less than twenty-three dollars and seventy cents?

A. We had charged him twenty-three dollars because it was old price and this project that he was doing continued on after this period of time and we had agreed to go through that project at the twenty-three dollar price, and he could have held us to it. While it was only a verbal agreement, our word is pretty good.

Q. Was twenty-three dollars your price?

A. Former price, former --

Q. Before April 1, 1974?

A. I believe that's correct.

Q. Now, has there been any time since April 1, 1974, where the net price of wall concrete has been reduced by your company, either by a direct price discount or by waiving waiting time or something

of that nature, to below twenty-three dollars and seventy cents?

A. Not that I'm aware of.

Q. Now, the twenty-three dollars and seventy cents figure that you set as your price on April 1, 1974, does that include some element of profit for the company?

MR. WEISS: I object to that, your Honor. That's -- requires a detailed accounting, cost accounting answer.

MAGISTRATE MAXWELL: All right, your objection is noted. The witness can -- will answer if he's able to.

THE WITNESS: Please repeat the question.

BY MR. FUZAK:

Q. Yes. Does the twenty-three dollars and seventy cents price for wall concrete, which you fixed as of April 1, 1974, include some margin of profit? Does it include anything for profit in that figure of twenty-three dollars and seventy cents?

A. No. That's a depressed price that we are forced to live with.

Q. How did you arrive at that twenty-three dollars and

seventy cents price? What kind of an analysis of your cost if any did you make?

A. I believe fundamentally, carries pretty much cement increases.

Q. Did carries pretty much cement increases?

A. Yes, the bulk increases.

Q. Did you do any kind of an analysis to see whether or not that twenty-three dollars and seventy cents price that you made effective April 1, 1974 would recover all of your costs of production?

A. I probably did at the time, I can't remember.

Q. Who would do that?

A. Well, that time, Mrs. Burkhold, myself and our salesmen. I believe Mrs. Burkhold, we all worked on it.

Q. Who is Mrs. Burkhold? That's a new name to me.

A. Well, she was office manager.

Q. Well, do you recollect what procedures were followed at that time back in April of this year or March of this year, to arrive at that figure, twenty-three dollars and seventy cents?

A. No. I -- I could not recollect how it was done.

Q. Do you know whether or not that twenty-three dollars

and seventy cents figure actually recovers for you, all of your costs for the production of that wall concrete, or whether it doesn't?

A. I don't believe it does today.

Q. Did it at the time you put it into effect on April 1, 1974?

A. I didn't -- I don't believe it did.

Q. What leads you to that belief? That's what I'm trying to drive at. How do you arrive at that belief?

A. Because we have been losing money steadily ever since, and because of the depressed conditions that were being forced and we were coping with.

Q. You had been losing money on wall concrete ever since?

A. I believe so, yes.

Q. Or just generally?

A. Generally, too, and including wall concrete.

Q. Do you know whether or not you had been losing money on wall concrete as a result of some analysis that's been done or some study of your operations that's been done?

A. I couldn't be exact to give you an answer of that

type.

Q. Has any study been done to your knowledge of your company's operations to determine whether or not you have been losing money on wall concrete business?

A. On that particular item, I don't believe so. No particular item, sir.

Q. Mr. Frey, has either the Plaintiff corporation or Frey Sand & Gravel, Inc., done any analysis, cost analysis to determine what the actual cost of a delivered ton of number one gravel would be to your Peppermint Road Plant, from your washer plant in Alexander?

A. I fail to follow what you are trying to get at.

Q. What I'm asking about is, whether or not any kind of a computation has been made to your knowledge, let's take it first from the Plaintiff corporation's standpoint, as to the actual cost of a delivered ton of number one gravel from Frey Sand & Gravel at Alexander, to your Peppermint Road Plant in Lancaster?

A. I don't think we particularly run a particular analysis on it. We have looked into it, but you got to keep in mind too, if we remove the number one gravel from

our Alexander Plant, we are going to curtail sales of other products in that area.

Q. I'm sorry, what do you mean by that?

A. We have a very good market in that area, for our sand and gravel operation.

Q. That's Frey Sand & Gravel, Inc.?

A. That's right, yes. Without using it in Frey Ready-Mixed Concrete. We start pulling some of the prime products out of there, we will obviously affect our other sales, or suspect we would affect them.

Q. In other words, number one gravel is a prime product in the industry, is that right?

A. It didn't use to be out there, but it's starting to be.

Q. Is it a prime product here in this area, in this local area?

A. It certainly can be with the new State specs.

Q. Is it now a prime product as you define that term?

A. I would say it would be.

Q. Have you done any computations, has the Plaintiff corporation done any computations to determine what the cost would be of providing number one gravel from the Alexander washer plant to the

Peppermint Road batcher plant?

A. I would -- you mean what does it cost to bring it in?

Q. The total cost, yes?

A. I imagine we have. I haven't got it in front of me.

Q. Well, do you know whether you did or not at any time?

A. I think I have.

Q. You have got some computations of that nature?

A. I think you got them in front of you.

Q. Where -- where would they be, what do you mean?

A. They may be on that sheet that you had a big discussion about.

MAGISTRATE MAXWELL: Referring to Exhibit AE?

THE WITNESS: Is Frey Sand & Gravel on there?

MAGISTRATE MAXWELL: I don't know. You look at it.

THE WITNESS: No, it isn't on here.

MAGISTRATE MAXWELL: Are you going into a new line of questioning now, or is this a continuation of the previous -- because I'd like to recess for lunch some time, that would be most convenient to all counsel.

MR. WEISS: Well, how long did your Honor have in

mind, till what time?

MAGISTRATE MAXWELL: Well, I'm thinking of either two o'clock or two-thirty.

MR. WEISS: If you can make it till two-thirty. I would appreciate it.

MAGISTRATE MAXWELL: Mr. Fuzak, would you want to go for a few minutes and finish up a particular subject, or do you want to recess?

MR. FUZAK: It doesn't matter.

MAGISTRATE MAXWELL: Why don't we recess -- is two-thirty objectionable to you?

MR. FUZAK: No, sir. Whatever you want.

MAGISTRATE MAXWELL: Would you prefer two-thirty, Mr. Weiss?

MR. WEISS: Yes.

MAGISTRATE MAXWELL: All right. Let's recess till two-thirty. We'll do it at this time. You are excused, Mr. Frey.

(Whereupon, a luncheon recess was then taken at 1:00 P.M.)

(Proceedings commencing after luncheon recess at 2:42 P.M. Appearances same as before noted.)

MAGISTRATE MAXWELL: Prior to the recess, I was handed four exhibits by Mr. Weiss, same being marked Court Exhibits 1, 2, 3 and 4. Also an excised portion of Court Exhibit number 4 marked 4-A. Mr. Weiss stated he did not feel it was constituted or part of the confidential communication and the copy of Exhibit 4-A was given to Mr. Fuzak. At that time, I stated that I would examine these documents in cameral for the purpose of making the determination whether or not they should be released to the Defendant's counsel for examination, as being not privileged. As to Court Exhibits 1 and 2, my examination of these Court Exhibits discloses that they are copies of the same letter, namely a letter addressed from an attorney for Mr. Frey to Mr. Frey himself. I might add for the purpose of the record, this letter is dated September 8th, 1955, and as I stated, both Exhibits 1 and 2 are the same. As to these letters, well, there may well be some question in my mind as

to whether they are in fact confidential communication -- or would be of such type which should not be released or could not be released without damage. My interpretation of the rules of privilege as they relate to attorney-client, and making particular reference to the advisory committee notes of the proposed rules of evidence for United States Courts and Magistrates. I'm going to take the position that they are confidential communications because there is no showing that an intent to disclose is apparent, and there is a showing to me that this is a communication between an attorney and client. I'm going to take the same position as to Court Exhibit 3, which is a letter dated February 6, 1956 addressed to George C. Frey, Frey Mix Concrete, Inc., attention Mrs. Muck. As to Court Exhibit 4, it is my understanding that this purports to be notes made by either Mr. Herbert Frey or Miss Lois Muck, as to chronology of their-- some of their dealings, at least between

the Plaintiffs or their representatives and the Defendants or their representatives. Again, while some of these matters might have no bearing on the lawsuit, it might not be of any importance to the Defendant if they were shown to him. A review of these matters would indicate to me those portions which have been excised, Court Exhibit 4, would relate -- refer either directly to communications between Mr. Frey or Miss Muck on the one part, and their attorney on the other part, or their interpretation of those conversations. It's my understanding -- I'm referring, Mr. Weiss to the second page of Court Exhibit 4, with reference to a man by the name of Iwanicki. If I recall correctly, Mr. Iwanicki is employed by Mr. Goldstein and is an attorney?

MR. WEISS: Yes.

MAGISTRATE MAXWELL: All right. Well, as I say, some of these may not be such as, or intended not to be disclosed. It's my reading of the proposal rules of evidence, that they

are not to be -- that they are considered as confidential communications unless an intent to disclose is apparent. So, as to all of the various documents, I'm returning Exhibits 1, 2, 3 and 4 to the Plaintiff.

MR. WEISS: Exhibit 4-A can be marked if Mr. Fuzak desires.

MAGISTRATE MAXWELL: Court Exhibit 4-A has already been marked, and it's my understanding that Mr. Fuzak has a copy of that exhibit.

MR. FUZAK: I do have a copy, thank you.

MAGISTRATE MAXWELL: Now --

MR. WEISS: Is this what you are looking for, your Honor?

MAGISTRATE MAXWELL: No, I'm not looking for anything -- you want to continue?

BY MR. FUZAK:

Q. Mr. Frey, when we recessed for lunch, we were talking about the Frey Sand & Gravel Corp. costs, and I think you made reference to this price sheet which has been marked here Exhibit AD-4. Does that represent the cost of production to Frey Sand & Gravel, Corp. of each of those items that are

offered for sale at those specified prices?

A. This is a price list, retail price list, yes.

Q. That's your retail price list, do those prices include some margin of profit, some percentage or amount for profit, with respect to each of those items that's included on that list?

A. I would say -- I would say yes.

Q. Now, has Plaintiff corporation or Frey Sand & Gravel Corp. done any analysis to determine what the cost of producing each of these items is, as of March 1, 1974, for example?

A. Yes, I would say we did.

Q. And, do you have those costs on some documents somewhere?

A. No, we do not.

Q. Do you have them on any writing anywhere?

A. No, I don't believe so.

Q. Were they on any writing -- were they put into writing at any time, these are the cost figures behind these prices that are listed on this Exhibit AD-4?

A. I don't remember us ever putting them in writing.

Q. Can you tell me how you went about determining

what the cost of production was, which went into your determination to charge these various prices that are listed on AD-4?

A. Well, you mean exactly how we done it?

Q. Yes.

A. No, I can't tell you. I think there's three or four of us participated in it.

Q. Did -- excuse me, go ahead?

A. We had to take into consideration what the market was doing, the surrounding market. In other words, our competition.

Q. Are you now talking about how you made your decision to charge the retail prices that are listed on Exhibit AD-4, here?

A. Yes.

Q. And, my question is to you, how did you arrive at the cost of production for each one of these items, if you did?

A. I couldn't tell you right now. I couldn't tell you exactly, I mean we had to take what items we had, what we are -- surplus. You have to keep in mind this plant is in a remote area, it's not exactly in Lancaster --I mean, it isn't right in Lancaster,

and we had to take into consideration the market area we was dealing with. And then we had to take into consideration what items were running in a surplus. In other words, stock piles up and then we had to take into consideration of what profit we was making and I think that had a direct bearing on how we derived it. All these things put together.

Q. In other words, one of the factors -- now you are talking about how you arrived at these list prices here that are on Exhibit AD-4. One of the factors that you took into consideration for example, was whether or not you happened to have a surplus of the particular material on hand as of that date, which was March 1, 1971 or around that date, is that right?

A. I would say that would probably be right.

Q. And, if you had such a surplus, would that have an effect on the ultimate price that you decided to charge for that particular material?

A. It usually did.

Q. Would it have an effect of making that price somewhat lower than it would be if you didn't have a surplus?

A. Yes. We'd have to consider that because if we had to go into re-handling costs, then it got expensive.

Q. What does that mean, re-handling costs?

A. Whereby you had to remove it from the pile in which it was made and --

MAGISTRATE MAXWELL: That doesn't amplify at all.

THE WITNESS: In other words, the pile in which it was produced in the plant. If you had to move it several times, it's a cost factor.

BY MR. FUZAK:

Q. I see. And, if you -- is this correct then, from what you are saying, that if you accumulate what would be more than the normal amount of a particular material, that you would -- might have to move it and that would be re-handling cost and that would add to the cost of the material?

A. It usually does.

Q. Did you or anyone for the Plaintiff corporation ever make an analysis to determine whether or not you could obtain number one gravel for example from Frey Sand & Gravel Corporation, at a cost less than you were able to obtain it from other sources in this area?

MR. WEISS: Which area is that?

BY MR. FUZAK:

Q. The Buffalo area, which his sister described in the testimony on Thursday?

A. Well, I think what you are trying -- I don't know just what you are trying to say. And, I think at this point, it is confusing. Did we -- would you try to be more specific?

Q. Sure, I'll try to rephrase that. Did you ever make any kind of an analysis to determine whether it would be cheaper for you, Plaintiff corporation, to obtain number one gravel from Frey Sand & Gravel Corp. in Alexander, and truck it to your Peppermint Road Plant, than it would be to obtain it from other sources in the Buffalo area?

A. I believe we did, but in so doing, we had to keep in mind that we would be affecting other products in that same plant and also we had -- in other words, we are affecting the retail of other products besides just the number one stone from this plant. From the Alexander plant.

Q. How do you mean? Why?

A. Well, if we sold all the pea gravel --

Q. Pea gravel is --

A. Number one stone. If we sold all the number one stone, we would be depriving the local area out there of number one stone.

Q. And, would that have an affect on your ability to sell some of the other products out there like number two or concrete sand?

A. I would -- I believe it would.

Q. In other words, is it in your experience, do customers for example from Frey Sand & Gravel Corp. want to buy not only number one gravel from you, but also concrete sand and if they can't get both, they're liable to go somewhere else?

A. No, it's not a case of liable to go some place else, they might be -- come back and still get it, but they expect to buy hauler needs,not just part of their needs from the one source.

Q. I see. Now, in the analysis or study that you did as to the cost of bringing for example number one sand -- number one gravel, I'm sorry, from Alexander to the Peppermint Road Plant, what did you find? Did you find that it would be cheaper, more expensive than or the same cost as you could get by buying it

locally here in the Buffalo area?

A. I don't remember at the time I done it.

Q. Do you have any -- did you put that down on paper, does anyone have that down on paper anywhere what those costs were and what the comparison might be?

A. I don't believe so.

Q. Did you do that kind of thing with respect to grit? In other words, did you make a determination as to what your actual cost of obtaining grit from Frey Sand & Gravel Corp. in Alexander and delivering it to the Peppermint Road Plant, would be?

A. Did we --

Q. Yes.

A. -- run an analysis?

Q. Yes.

A. I believe we brought in some grit, we had done that at various times when Pine Hill hasn't been supplying the grit. We do it -- we did it when we were short on grit, we did it when the truck that was hauling our crushed stone -- it didn't have anything else to do, he would run out and get a load of grit, but as I remember, our price was a little

bit higher. It actually cost us a little bit more to do it than it would buying it from somebody else at the time.

Q. And, would that call --

A. It's not a lot of difference, but there was a little difference.

Q. And, the cost you are talking about would be the Plaintiff corporation, Frey Concrete, right?

A. Yes.

Q. And, would that cost be based on the list price of the grit here for example, the dollar twenty-five?

A. No, that's fine sand.

Q. I'm sorry.

A. Two fifteen.

Q. That would be the -- the figure that would be cranked in for the cost in, to you, from purchasing from Frey Sand & Gravel Corp?

A. Normally, yes.

Q. Now, did you do an analysis to find out what it would cost you to provide the Plaintiff corporation with concrete sand from Alexander to the Peppermint Road Plant, based on the actual cost of production to Frey Sand & Gravel Corp. of this concrete sand,

rather than the list price?

A. No. I think what you are aiming at, can we produce it a lot cheaper if we were possibly consuming our own products, not selling to somebody else. I don't believe we done anything like that.

Q. What I'm also asking about is, whether or not you did anything to develop what the ultimate cost to the Plaintiff corporation would be, of concrete sand from Alexander, if instead of charging two dollars and fifteen cents list price, the amount included would be the actual cost of production to Frey Sand & Gravel Corp. of the concrete sand?

A. Would you want to detail that a little -- that's real --

MAGISTRATE MAXWELL: Could I take just a few minutes before -- I know you have to make a phone call, but I do have a phone call I have to answer. I'll be back in a few seconds.

(Whereupon, at 3:00 P.M. a short recess was then taken.)

(Proceedings commencing after recess at 3:02 P.M. Appearances same as before noted.)

MAGISTRATE MAXWELL: Off the record, still.

(Discussion off the record.)

MAGISTRATE MAXWELL: I think I forgot to, Mr. Frey, but I assume there is no need again to remind you that you are still under oath.

M[illegible]JZAK: I think we had a question pending if you could read it back.

(Whereupon, the above-requested testimony was then read back by the reporter.)

MR. FUZAK: Mr. Frey, did you -- have you at any time m[illegible]e an effort to determine what the actual cost, without including of any profit margin, would be of producing concrete sand at Alexander, and trucking it to the Peppermint Road Plant?

MR. WEISS: Well, I object to that, your Honor, unless all of the conditions are set forth. He -- saying concrete sand. If there is going to be more to it, like any other products or -- quantity, quality --

MAGISTRATE MAXWELL: Maybe he can answer the question. I think he's more familiar with it than we are, if he can't --

MR. WEISS: I think Mr. Fuzak is going to ask him

another question, and I just want him to put it all together.

MR. FUZAK: Well, I tried to keep it down because you objected to it.

MAGISTRATE MAXWELL: Let's see if you can answer it, Mr. Frey.

THE WITNESS: In view of our market value that we have in Alexander, I don't know why we did such a thing, but I don't know why we should do such a thing, why we should run always in a depressed condition as we have in Buffalo. Why should we do it in Alexander, for what purpose?

BY MR. FUZAK:

Q. What do you mean by a depressed condition?

A. Well, in Buffalo we have been depressed with our largest competitors forcing us down on everything that we do. Every opportunity. Say they get -- they seem to capitalize on. For example, we have this condition whereby there is tie-in sales for example Lancaster Sanitation Sand Fill has delivered free fill to customers with the understanding that they get the concrete, most outstanding job is this

Eastern Hills Mall job. They seem to be quite free with reimbursements of credits and things of this type. Financial credits on waiting time, these are all things that we can't do. And, I -- can't possibly comprehend what their goal is other than to drive us out of business.

Q. Well--

A. With a predatory action.

Q. What does that mean, predatory action?

A. Well, do you want a definition of a predator or what?

Q. Well, whatever you meant. I don't know, you used the word, sir. I just wondered what you meant by it?

A. Well, it seems every time they have an opportunity to do damage to us or hurt us, they do this.

Q. You mean by competing with you?

A. That's right. Not only that, in the sand and gravel business, there's definite indications of the things that they have did to try and hurt us.

Q. Well, let me ask you this. What has that got to do with any decision to make use of products from Alexander here in your Peppermint Road Plant?

A. Why should we? That plant runs independant.

It was not built to serve Lancaster, it was a separate business and why should we sell into Lancaster and try and cut the price to -- cut our price to anybody in that area? We sell what we feel is a fair price in the area, why should we try to sell to ourselves or anybody else in this area or any other area and thereby -- for, create a problem that we don't have out there?

Q. You mean out in Alexander?

A. That's right. Should we start a problem like Pine Hill has started with us, and created with us?

Q. Mr. Frey, at any time to your knowledge has the Plaintiff corporation made any kind of a cost analysis to determine what the actual cost of obtaining number two gravel from your Alexander Plant would be, to the Peppermint Road Plant?

A. No, other than looking at the -- the apparent list price and leaving it go at that.

Q. All right. Would your answer be the same if I asked it to you -- the question, with respect to the concrete sand, the grit?

A. Yes.

Q. Mr. Frey, in your affidavit which you filed with the

Court and which was sworn to on October 24, 1974 in paragraph forty on page fourteen, you make the following statement. Quote, "Presently we are operating at a loss for this year of approximately one hundred and fifty thousand dollars for the first nine months of this calendar year and we are still continuing to operate at a loss during this last quarter." Period close quote. Does that statement refer to the operations of Frey Concrete, Frey Concrete, Inc.?

A. That is correct.

Q. It does not include the operations then of Frey Sand & Gravel Corp.?

A. No, it doesn't.

Q. Now, can you tell us what your profit situation was for 1973? How did the company end up in 1973, the Plaintiff corporation?

MR. WEISS: Your Honor, I'm not trying to delay this, but if accuracy is important, we'd be happy to furnish this to Mr. Fuzak tomorrow.

MAGISTRATE MAXWELL: Again,maybe Mr. Frey knows --

MR. FUZAK: Well, I think he probably knows within

some range as president of the company, I would expect.

MAGISTRATE MAXWELL: Answer if you can, Mr. Frey?

THE WITNESS: I can't answer it. All I know is, we didn't have to pay any tax.

BY MR. FUZAK:

Q. Are you saying that to your recollection there was a loss for your operations, and by yours, I mean talking now again of course about Frey Concrete, Inc., for the year 1973?

A. I don't know whether we quite made a loss or a profit. It was right on that critical point.

Q. I see.

A. I know there was no tax paid.

Q. Which -- but you don't know the reasons whether that was because of a carry forward or something of that nature?

A. I don't believe so.

Q. Okay. Can you tell us what your profit situation or results were for the year 1972?

MR. WEISS: Your Honor, I think we gave them these -- didn't we give them statements of profit and loss already?

MAGISTRATE MAXWELL: Have you seen any, Mr. Fuzak?

MR. FUZAK: They may have gotten them, but these are --

MAGISTRATE MAXWELL: He can answer. He can answer.

MR. FUZAK: Unless time consumed --

THE WITNESS: I couldn't answer that, sir. I think my sister might be able to.

MR. FUZAK: Can you tell us what the profits or losses for the operation were for 1971?

THE WITNESS: No.

MR. FUZAK: Well -- was the corporation, the Plaintiff corporation here operating at a profit, do you know, in 1968?

MR. WEISS: '68 or '5[illegible]

MAGISTRATE MAXWELL: '68.

MR. FUZAK: '68. Six, S-I-X.

MR. WEISS: Well, your Honor, I think Mr. Fuzak -- I don't know how long he's going to be.

MAGISTRATE MAXWELL: I realize that. He can still answer the question.

MR. WEISS: If he would just take the return out --

MR. FUZAK: It's going to take me three minutes to do it, if Mr. Weiss would stop objecting.

MAGISTRATE MAXWELL: Mr. Frey, if you know the answer, say so. If you don't know the answer, say so.

THE WITNESS: I do not.

MAGISTRATE MAXWELL: Okay.

MR. WEISS: If Mr. Fuzak knows the figure, I'll accept it.

MAGISTRATE MAXWELL: All right. Next question.

MR. FUZAK. I don't know the figure, Mr. Weiss. This man is the president of the corporation, I'm asking him. Mr. Frey, do you know whether the corporation operated at a profit or a loss for the year 1969?

THE WITNESS: No, I don't.

MR. FUZAK: Do you know whether it operated at a profit or less for the year 1970?

MR. WEISS: Offhand, you mean?

MR. FUZAK: Not offhand.

MAGISTRATE MAXWELL: Please, just answer the question to the best of your ability.

THE WITNESS: I don't believe we did.

BY MR. FUZAK:

Q. You don't believe you operated at a what?

A. Profit.
Q. In 1970?
A. No.
Q. Okay. How about 1971, sir?
A. I'm not sure. There's years of loss, I'm not sure which ones are which.
Q. In paragraph forty-three on page fifteen, of that same affidavit of October 24, 1974, you make reference to some tests that you did on grit provided by Pine Hill for moisture content. Can you tell me what tests you make reference to there? I'll show you the paragraph if it will be helpful to you.
A. Forty-two?
Q. Forty-three.
MR. WEISS: Isn't there -- off the record.
(Discussion off the record.)
BY MR. FUZAK:
Q. After reading that paragraph, can you tell me what tests you make reference to in that paragraph?
A. It was a moisture test, yes.
Q. And, who did it?
A. Oh, sometime -- well, first we had our men do it, Mr. Kasmore.

Q. Who?
A. Larry Kasmore.
Q. Can you spell that, please?
Would you spell it, please, Lois?
LOIS AUDREY MUCK: K-A-S-M-O-R-E.
BY MR. FUZAK:
Q. Is that an employee of the Plaintiff corporation?
A. Yes. We had a man from Master Builder Supply, he ran it one time.
Q. Who was that, please?
A. Craig Williams.
Q. And, when were -- Craig Williams, right? When were these tests done by Mr. Kasmore and Mr. Williams?
A. On or about that time.
Q. Which time? I don't see any time expressed here. You mean the time you discontinued buying concrete sand?
A. Prior to that, yes.
Q. And, you stopped buying concrete sand from Pine Hill in 1972, is that right?
A. I'm not sure of the date exactly, I believe that's about right.
Q. And, did you have any other tests done by others

at that time?

A. Mr. William Slow.

Q. Spell it, please?

A. S-L-O-W, I believe.

Q. Who's Mr. Slow?

A. Well, at one time he used to work for Master Builders Supply, and he's got a little consultant business now, he does that type work. I believe we took some into a lab too, and had them run it and I'm not so sure that we didn't have the lab out and have them take it directly from the trucks and run it.

Q. What lab would this be, please?

A. I don't know whether it's Pittsburgh or Empire. It must have been one or the other, maybe both. It's been quite a while.

Q. Were the results of these tests put down in writing of some kind, any of them?

A. I believe they were.

Q. All of them?

A. I believe we still possess some samples that we have sealed.

Q. And, you have written results of these various tests that you described?

A. I believe those people do have. We used to get moistures up not too uncommon, up to as much as five percent too much over other people.

Q. Mr. Frey, have you or anyone on behalf of the Plaintiff corporation ever offered to sell the corporation or its assets to Pine Hill?

MR. WEISS: Can you fix the time, please?

MAGISTRATE MAXWELL: I think he said ever.

BY MR. FUZAK:

Q. Ever?

A. I can't remember.

Q. Do you have any recollection of any representative of the Plaintiff corporation offering to sell the corporation or its assets to Pine Hill for a million dollars?

A. No.

Q. Do you know whether that was done or not?

A. I don't remember a thing of that type.

Q. Excuse me just a minute.

MAGISTRATE MAXWELL: All right.

MR. FUZAK: Mr. Frey, did you personally participate in any meetings with any of the Pfohl brothers that are listed as Defendants here,

or representatives of Pine Hill or Regent Sand & Gravel in connection with the contract of May 17th, 1949 after 1957, when Pine Hill purchased the Pfohl ...nt?

THE WITNESS: Would you please repeat that question?

(Whereupon, the above-requested testimony was then read back by the reporter.)

MR. FUZAK: I might add to that too, and before the commencement of this litigation in 1970?

MR. WEISS So, you are talking between 1957 and 1958?

BY MR. FUZAK:

Q. 1970. The action started in 1970?

A. Did we meet with Pfohl? I think I'd have to say no, I don't remember any meetings with Pfohl.

Q. All right, sir. How about with any representative of Pine Hill or of Regent Sand & Gravel, the other two Defendants, here?

A. Can you give me the drift? I think you must have something in mind, can you give me a drift of what this meeting might have consisted of?

Q. I honestly do not. I just wanted to find out from you whether you had any such meetings? I'm not

thinking about anything in particular, frankly.

A. Yes, there was one meeting. I can't tell you exactly what all happened, but I know we -- my father and I was in Pine Hill's ofice on Bailey Avenue.

Q. Can you tell me about when that was, what year?

A. No, I cannot. But, I do remember coming away with Mr. Kahle implying that he didn't buy our contract and that wasn't put to us in that mild a tone, either.

Q. Well, can you give --

A. But, he inherited it as a gift or something, or words to that effect.

Q. Could you give me your best recollection of what occurred at this particular conversation that you are talking about?

A. Well, that was -- that was a key thing and I think I remember, and I think at that time we came in to discuss price.

Q. And, who else was there, you and your father and apparently Mr. Ludwig Kahle?

A. Yes.

Q. Anyone else?

A. Gee, if I remember right, I think Melvin Becker was

there and I think there was a -- I think his name was Shipston. Is there a man named Shipston?

Q. Shipston, yes.

A. Shipston.

Q. Now, have you given us the best of your recollection as to what occurred in that conversation?

A. That's the only thing I distinctly remember, coming out of that particular conversation.

Q. Okay. Do you recollect any other conversations at which you were present, involving any representative of either of these two corporations in those dates that I gave you?

MR. WEISS: You mean personally or phone or -- phone?

THE WITNESS: I had nothing with Pfohl, I'm sure.

BY MR. FUZAK:

Q. No, he said phone. He's asking whether I mean personal meetings or telephone. I mean both.

A. I'm sure there has been some, but I just don't recollect.

Q. All right. You think there have been some, but you just don't recollect what happened on these occasions if there were any, is that right?

A. I remember one time Mr. Kahle came up to the office and he visited with my father.

Q. And, you were present?

A. I was present, but I can't remember too much what happened -- what took place. I think it was discussing the price at the time. Not that anything was resolved at the meeting, I don't think anything was.

Q. All right. Anything else that you can remember? I'm sorry, I didn't know whether you answered the last question?

A. I don't know on -- if you are referring to the date before this litigation, before litigation started, we were in, I'm still referring to my sister and I were in the Pine Hill's office to meet Mr. Kahle.

Q. And, did you meet with him?

A. No, he -- at least I don't think we did.

Q. All right.

A. If he was there, I didn't know it. And, I met with Mr. -- my sister and I, we met with Mark and Mr. Moran.

Q. That's Mark Kahle?

A. Yes.
Q. Yes. And -- what was the substance of that conversation, if you remember?
A. Well, after the normal niceties, we were taken into a back room and we talked about the meeting that we were supposed to have with Mr. Kahle, Moran was supposed to set it up. And, we wanted to talk and communicate with him, but he wasn't there -- something else had happened at that meeting. Oh, I believe that's when Moran implied that we only renewed one phase of our agreement, or contract and that they didn't have to abide any more with the agreement and contract. In other words, the only thing that he was going to go along with, was the rental of the property. And, at that time I think I was so darn mad, it's not fair to say that I remembered anything from that point on. We left fundamentally.
Q. All right. Do you recollect any other conversations between that period of time, between 1957 and '70 when you started this action?
A. Not offhand, sir.
Q. Do you have any knowledge, Mr. Frey, as to how the

prices were established for materials sold by Pine Hill to the Plaintiff corporation, after 1957 and to the time of the commencment of this action?

MR. WEISS: How they were established?

MR. FUZAK: Yes. Could you maybe read that question back?

THE WITNESS: Can you read that back? I don't think I comprehend it.

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: Would you rephrase it? Somehow I just -- I'm not getting anywhere with the question.

BY MR. FUZAK:

Q. All right, fine. Are you aware, sir, that there were changes in prices of the materials sold by Pine Hill to the Plaintiff corporation, between 1957 and 1970?

A. Yes.

Q. All right. Did you have any participation in any discussions which were had between representatives of Pine Hill and the Plaintiff corporation, relating to those changes in prices?

A. Closest I remember, and I don't even remember what

took place, is the time Mr. Kahle came up into the office and visited my father on the subject. They bickered back and forth and I was in and out of the office a number of times. They were -- they have had -- hashed over old times and stuff that didn't pertain to that, and I was back and forth. I -- I don't remember what came out of it, but they were haggling on that, I know.

Q. All right. Any other occasion when you were present at any conversations relating to the establishment of prices for materials sold by Pine Hill to your corporation, in that period, 1957 till the time of the beginning of this action in 1970?

A. Not any time that I remember I was present. I'm not saying my father didn't, I'm just saying I wasn't present.

MR. FUZAK: That's all I have with Mr. Frey, your Honor.

MAGISTRATE MAXWELL: You have anything?

MR. WEISS: No, your Honor.

MAGISTRATE MAXWELL: Of Mr. Frey? Okay. Mr. Frey, you are excused. How about Mrs. Muck? Is it anticipated Mrs. Muck will be called

back?

MR. FUZAK: Excuse me just a minute, please. Not as far as I know at this time, your Honor.

MAGISTRATE MAXWELL: All right. It's my recollection that there were some matters which may have been left unresolved, I'd like to clear the record as to whether in fact they have or have not been resolved. My understanding, that upon completion -- or during the noon recess, Mr. Weiss was to produce for marking, the corporate file which Mrs. Muck had previously allowed the Defendants to examine.

MR. FUZAK: That's right.

MAGISTRATE MAXWELL: That has been marked?

MR. FUZAK: No, it has not been marked.

MAGISTRATE MAXWELL: All right. Why don't we mark that?

MR. WEISS: Well, actually your Honor, there are three separate files in there. Would you want to mark the three of them separately?

MAGISTRATE MAXWELL: Well, are they in one envelope?

MR. WEISS: I'll take the other material out.

MAGISTRATE MAXWELL: If they're in one envelope and

that is the envelope consisting of the files which were examined by Mr. Fuzak, I think we should mark it that way.

MR. FUZAK: Exhibit AF, I believe is the next one, yes.

MAGISTRATE MAXWELL: The last one was A-E, so it would be A-F.

(Whereupon, a file folder was then received and marked Defendant's Exhibit AF for identification.)

MAGISTRATE MAXWELL: My understanding, that the Plaintiff is going to furnish to the Defendant, cost of construction of the so-called garage plant.

MR. FUZAK: Right.

MAGISTRATE MAXWELL: That will be furnished, Mr. Weiss?

MR. WEISS: Yes. An attempt will be made to get the figures together. I don't know --

MAGISTRATE MAXWELL: All right. Do you have any idea how long it's going to take?

MR. WEISS: Well, Mr. Frey -- has indicated it will take a while.

MAGISTRATE MAXWELL: As I understand it, that's not something that you are going to need for further examination, is that correct?

MR. FUZAK: I don't need that right now, no.

MAGISTRATE MAXWELL: It's my understanding also there was a question raised as to the amount of purchases from General Crushed Stone from the Peppermint Road Plant.

MR. WEISS: Not the amount, the price.

MAGISTRATE MAXWELL: Pardon?

MR. WEISS: The price. That's set forth on this Exhibit AE.

MAGISTRATE MAXWELL: That's what I want to make sure. Was it the amount or was it the price?

MR. WEISS: I thought he was asking about the price.

MR. FUZAK: I think the question was, whether there were purchases of gravel from General Crushed Stone, and if so, the price.

MR. WEISS: Well, this is the price. If there were any purchases, it was at these prices.

MAGISTRATE MAXWELL: You mean as set out in the Exhibit AE?

MR. WEISS: Yes. Is that --

MAGISTRATE MAXWELL: That satisfy you, Mr. Fuzak?

MR. FUZAK: The problem is, whether or not there were any purchases, because I'm not sure this, on Exhibit AE, purport to be the persons from whom purchases were made in each one of those years or just prices.

MR. WEISS: Do you know that offhand?

THE WITNESS: Yes.

MAGISTRATE MAXWELL: Do you want Mr. Frey to testify as to it?

MR. FUZAK: Yes. He might as well put it on the record.

THE WITNESS: On '74, you're referring to? Year '74? This year?

BY MR. FUZAK:

Q. Yes?

A. Yes, we bought pea stone.

Q. I'm sorry.

A. Number one.

Q. Number one. For the Peppermint Road Plant?

A. Yes.

Q. And, how about the previous years? Do you know

for 1973 and '72?

A. I'm not sure about them, but you asked for -- you are talking about General Crushed --

Q. Yes.

A. Yes, we bought some from them.

Q. My question is -- I don't think Mr. Frey's in a position to answer it --

A. Wait.

Q. Excuse me.

A. I don't want to leave you with a misconception.

Q. All right.

A. We bought more from Franklinville Gravel than we did from General Crushed Stone, though, on number one crushed stone.

Q. For the Peppermint Road Plant?

A. Yes.

Q. I see. And, are you now still talking 1974?

A. Yes.

Q. Well, just to clarify this further, I'm sorry to get back in --

A. That's okay.

Q. -- we might as well get it straightened out. There's a stock pile of number one gravel at the garage

plant, is that correct?

A. No, it's in the garage area. We don't necessarily use it in that plant at all.

Q. I understand. In the garage plant area is what I meant?

A. Yes.

Q. Okay. And, is that -- is the material from that stock pile used for the Peppermint Road Plant?

A. It has been used in there. We have had some requests for round and crushed gravel. That came from Franklinville.

Q. That's where that's -- where that material in that stock pile came from?

A. Yes.

Q. Okay. Excuse me just one minute.

A. Go ahead.

Q. Mr. Frey, am I correct that you -- you cannot testify as you sit there, as to whether purchases were made from, for example, General Crushed Stone in each of the years, 1968 up to 1974, or can you? I don't want to put words in your mouth. Are you able to testify whether or not your corporation bought number one gravel from General

Crushed Stone in each of the years, 1968 through 1973?

A. You mean in the Lancaster Plant?

Q. Yes.

A. I don't --

Q. For the Peppermint Road Plant?

A. I don't believe we did.

Q. Did you --

A. Since '74 we did. I don't believe them other years we did, only on special -- real odd ball requests.

Q. Did you buy, during those years, 1968 through 1973, for the Peppermint Road Plant, from Franklinville? Do you know that?

A. I believe that the answer would have to be the same.

Q. I wonder, maybe it would be easiest to just ask if Mr. Frey would confirm that for us?

MAGISTRATE MAXWELL: That could be confirmed one way or another by letter, is that all right, is that satisfactory?

MR. FUZAK: That's satisfactory.

THE WITNESS: Do you want the plant price put in the same letter?

MR. FUZAK: Yes.

MAGISTRATE MAXWELL: Yes.

MR. FUZAK: What I want to know is, whether the Plaintiff corporation bought gravel from General Crushed Stone in the years 1968 -- through 1973, or which of those years if any, and the price charged or the price paid, I should say.

MR. WEISS: Well, the price is here.

MR. FUZAK: That's the price, all right.

MR. WEISS: As I understand it, if any was bought -- in each year, as I understand it, in which a price appears here, gravel was bought. The only thing -- from that company. The only thing that does not appear here, whether that gravel went to West Seneca Plant or the Pavement Road Plant and it's important to you apparently to learn which plant it went to.

MR. FUZAK: Pardon me, let me just check that, Mr. Weiss. Is that right, Mr. Weiss' description of this Exhibit AE?

THE WITNESS: I don't think his description is correct.

MR. FUZAK: Well, let's take a minute and get that cleared up if we can. Take a look with me, here, at Exhibit AE, please.

THE WITNESS: He implied that any price that was on there we bought from.

MR. FUZAK: Yes.

THE WITNESS: Not necessarily true, I don't believe.

MR. WEISS: All right, I stand corrected.

MR. FUZAK: This is what I would like to have information verified on.

THE WITNESS: All right. You wanted -- that went to Lancaster from '73 -- no, '71, '72, '73, is that it?

MR. FUZAK: From '68 to 1973 because as I understand, you already did testify about 1974 that you did buy from General Crushed Stone and from the Franklinville --

THE WITNESS: Okay.

MR. FUZAK: All right. And, as I understand it, these would -- these prices that are listed here on AE, would represent the prices that you paid, if you did make those purchases?

THE WITNESS: That would be correct.

MR. FUZAK: I think that straightens that particular item out, your Honor.

MAGISTRATE MAXWELL: Okay. I think there was also

a question raised as to the amount of the discounts which may have been given to Gernett and others. Now, that may have been answered by Exhibit AE, I don't know.

MR. WEISS: The amount of what?

MAGISTRATE MAXWELL: Has it?

MR. FUZAK: The amount -- the price of Gernett -- from Gernett is listed here now on Exhibit AE, I think that answers that, yes.

MAGISTRATE MAXWELL: Okay. It's my -- the only things that I can see that are open as far as continuing or completion of the Defendant's examination before trial, would relate to the examination of Mrs. Frey, is that correct? In other words --

MR. FUZAK: That's right, at this time.

MAGISTRATE MAXWELL: The Defendants have completed their discovery, with the exception of an examination of Mrs. Frey. Now, you have seen that letter I believe Mr. Fuzak from Mr. Weiss, relative to Mrs. Frey's condition. Is there anything you want to say on it, or is there anything we can all agree on as

to what procedure should be followed?

MR. FUZAK: Yes, your Honor, but one thing. I would not like to be foreclosed if the necessity arose to have further examination at some time in the future of either other witnesses or the witnesses that have been examined, not for repetitive purposes, but for in the event that some knowledge came --

MAGISTRATE MAXWELL: Well, if something new came up, I'm not trying to foreclose you as you know, we are trying to get this trial disposed of.

MR. FUZAK: Yes, I understand.

MAGISTRATE MAXWELL: So, there's going to be no delays for this examination. That's something you have to determine as you go along. All right. Now, the next -- well, what did you want to do about Mrs. Frey. You indicated in your letter, Mr. Weiss, that maybe early spring I believe, before, you felt it would be advisable from a medical standpoint of Mrs. Frey's examination --

MR. WEISS: We presently anticipate she'll be able

to testify and she's still recovering. And, I think after the first of the year, we'll see how she's coming along.

MAGISTRATE MAXWELL: Why don't you keep Mr. Fuzak advised as to her physical examination as you can appreciate it to your advantage to have that deposition. So, keep Mr. Fuzak advised of Mrs. Frey's examination.

MR. WEISS: There's one -- you wanted to mark these?

MR. FUZAK: It's the originals of those.

MR. WEISS: Original documents, here. That was AC, I think, 1 through 8.

MAGISTRATE MAXWELL: Oh, that's right. I'm sorry. So, they will be marked at this particular time, then, by the -- they can be marked upon completion of this hearing by the court reporter.

MR. FUZAK: Those would be Exhibits AC-1 through AC-8?

MAGISTRATE MAXWELL: Right. The only thing that might remain would be the commencement and the continuation of the examination of the Defendants by the Plaintiff. I think you are

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Transcript of Proceedings Before Court, October 16, 1974.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

GEORGE C. FREY READY-MIXED CONCRETE, INC.;
GEORGE C. FREY BATCHING PLANT, INC.; and
HERBERT FREY and LOIS MUCK, as Co-Executors
of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

CIV. 1970-277

-v-

PINE HILL CONCRETE MIX CORP.; REGENT SAND &
GRAVEL CORP.; LUDWIG F. KAHLE, JOSEPH PFOHL;
PAUL M. PFOHL; and FIDELIS H. PFOHL, indivi-
dually and as the controlling and surviving
directors, officers, shareholders, liquidators
& receivers of the assets of PFOHL BROTHERS,
INC., a dissolved corporation, and PFOHL
BROTHERS, INC.,

Defendants.

* *

Proceedings held before the HON. JOHN T. CURTIN, United States District Judge, in Part I, United States Court House, Buffalo, New York, on October 16, 1974, January 20, 1975 and May 12, 1975.

APPEARANCES: RAICHLE, BANNING, WEISS & HALPERN, Attorneys for Plaintiff; ARNOLD WEISS, Esq., of Counsel.

MANZ & MANZ, Attorneys for Defendant; by VICTOR E. MANZ, Esq.; HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR, of Counsel, by VICTOR T. FUZAK, Esq.

PROCEEDINGS: October 16, 1974, 10:15 a.m.

APPEARANCES: As before noted.

MR. WEISS: Your Honor, I just have a preliminary request. I am sure I know the answer to it, but I would like it to appear on the record, that the present application by Mr. Fuzak is on behalf of all the defendants. That is not just to the defendant Pine Hill, but on behalf of all the defendants. If I could have an answer to that, it would be proper.

MR. FUZAK: Yes, that's correct.

THE COURT: Very well. This morning, it seemed to me that on this, do we need testimony on this particular increase?

MR. FUZAK: I don't particularly see any necessity for it. Mr. Moran is here, if your Honor feels it is necessary. I will be glad to address the Court briefly as to the nature of the motion and the grounds for the motion. I think most of the pertinent information is in the papers.

THE COURT: Why don't you explain to me, Mr. Fuzak, what the situation is.

MR. FUZAK: Yes, sir. Very briefly, your Honor, this is a motion by the defendants to update and make current an order that your Honor signed and was entered on June 9, 1971. By that order, the Court directed and ordered the defendants here to sell gravel and grit to the plaintiffs at specified prices. The pertinent paragraph of the order that we are dealing with reads as follows, "Ordered that effective immediately upon service of a copy of this order and until further order of this Court the defendant Pine Hill be, and it hereby is directed to sell and supply to the plaintiffs, George C. Frey, Ready-Mixed Concrete, Inc., and/or George C. Frey Batching Plant, Inc., the said plaintiffs reasonable requirement of concrete sand" parentheses "Grit, Number 1 Gravel and Number 2 Gravel at the current retail prices charged by Pine Hill or said materials, to wit", and then there is the specifications of the prices that were at that time current. Then the order goes on to say that all of the prices would be

less twenty per cent and a further two per cent discount if the bills are paid within a specified period of time.

Your Honor may recollect that in response to a motion made in court by the plaintiffs, - there were no moving papers as such, - an order was granted on May 7, 1971, requiring the defendants to make deliveries of these aggregates sand and gravel to the plaintiffs at 1967 prices despite the fact that the defendants had increased their list prices and their selling prices to others in 1971. As a consequence of a motion to amend that May 7, 1971 order to make those prices current, the Court did that and I just read to your Honor the order of June 9th, the relevant paragraphs of that order which make that order current to the prices in existence at that time. I think it is quite plain from the papers that are before the Court and transcript of the proceedings that what the Court had in mind at that time was to institute prices and have Pine Hill charge Frey

prices that were current at the time that the deliveries were being made. I don't think the Court had in mind in any way fixing prices for an indefinite period of time into the future which Pine Hill would have to charge despite any increases in costs and despite any increases that it might make in its prices to other customers. I think that is very apparent from the wording of the order itself which talks about until further order of the Court and the wording of the order itself which mentions the current prices then in effect at that time.

In addition to that, your Honor may remember that prior to entering the order of June 9, 1971, you requested that counsel for both sides suggest alternate ordering paragraphs, alternative ordering paragraphs to those that were in effect in the May 7, 1971 order which required the prices to be charged at the 1967 basis and in doing that, the plaintiffs in this action submitted a number of different proposed alternate provisions and if your Honor will

refer to them at some time I can tell you that each one of them has inherent in it a method for keeping the prices current on some basis or other and not fixing them as of the prices that were in existence in 1971. Specifically, just to shorten the matter, I can point to - -

THE COURT: Mr. Fuzak, just a minute.

MR. FUZAK: Yes, sir. I can point to the fifth proposed alternative price provision suggested, however reluctantly, but nonetheless suggested by the plaintiffs here which would have been that the prices charged would have been at defendants' list prices published as of January 1 of each year which indicates a gain the intention of the Court and I think if counsel could come up with some kind of an order that it would be kept current with the prices that were currently being charged by Pine Hill. Now, there have been no price increases by Pine Hill in either grit or gravel since 1971 until April 1, 1974.

On April 1, 1974, Pine Hill, as a

result of the inflation with which we are all very familiar, and has been double digit inflation over the past several years, had to increase it prices for gravel and it has done that and it has sent notices around to all its purchasers and customers of prices effective as of April 1, 1974 would be increased and they were increased and that notice was sent to the Frey people. The Frey people refused to pay the increase in the prices and on advice of counsel and until we could obtain a ruling from the Court, the defendants here continued to make deliveries on the basis of the June 9, 1971 order and those prices, reserving, of course, the right to recover the difference between the true prices which are in effect today and those outdated and outmoded prices that are contained in the June 9, 1971 order. Now, a variety of claims are made in the answering papers, most of which, I think, are entirely irrelevant to the issue involved in this matter and most of which I submit are put up for purposes

of obscuring the true issue because the true issue is a relatively simple one and that is should the Frey people be required to pay the list prices, the same prices that Pine Hill is charging to its other customers, less, of course, the favored discriminatory, twenty per cent plus two per cent discount, which the Court has ordered be continued to be applied or should they be allowed to have a further discount by having that twenty per cent and that two per cent discount be applied to 1971 prices which are no longer being charged and thereby obtaining even a further beneficial status as opposed to other people buying gravel from the plaintiffs here. I think the answer is rather simple. We have submitted to the Court proof, I think, that is very clear in the affidavits which indicates that there is a new price list that went into effect on April 1, 1974. There are sworn affidavits that these prices are being charged to the Pine Hill other customers. We have submitted, although

we don't consider it to be relevant, actually, we have submitted to the Court, some materials relating to the increases in the prices of our cost components for the production of these materials and I think those things are very clear and they show that there have been very material increases in cost and I think the Court, of course, will take judicial notice of that in any event.

Now, one of the problems that has come up here, to which I might address myself, because I am going to request for leave with respect to it is this; this case really is a breach of contract action. That is what it really comes down to and I may have more to say about that later on, I am sure, but in any event, it is a breach of contract case and what the plaintiffs here are seeking to do is to enforce a contract that was entered into in 1949 pursuant to the terms of which they claim they are still entitled to receive all of their requirements of sand and gravel for their batching plant on the

Peppermint Road area out there in Lancaster from the defendants here at the defendants' prevailing pit prices, what they are charging others less twenty per cent and two per cent discount and that is what this case is all about, but that contract, very interestingly, provides specifically that the defendants must buy all of their requirements for that particular plant, at least, and I think there is some question as to whether or not they don't have to buy their requirements for other plants that they may locate, but at least certainly for that particular plant that contract very specifically and clearly provides that the defendants must buy all of their requirements of sand or grit as it is commonly known and gravel in order to produce their ready-mix concrete. Now, what has happened here is that the defendants would like to have a part of that contract enforced by the Court, but not the other part and what they did, in effect, was they stopped buying grit or

this concrete sand from the Pine Hill people and nonetheless, insisted on us supplying them with their gravel requirements. Now, the effect of that is really quite simple. It is this; in the production of gravel, you take the bank run material and in producing it, generally speaking, you get on the average of about sixty per cent of concrete sand. That is grit which is also used in the production of ready-mixed concrete and the other forty per cent is gravel which is also used in the production of ready-mixed concrete.

Now, if you just produce that material and you just sell the gravel and not the grit, you get into an intolerable situation because you are not selling all of the produce that you should be selling and if you are required to keep on producing in order to produce gravel for someone's requirements and you can't sell that grit, you are getting into an intolerable economic situation and that is what is exactly happening here because since 1972, these

people in the guise, and I say that with some degree of certainty, in the guise that we have not provided them quality grit, they have said, "We will no longer buy grit from you", and they have not bought any grit from us. As a consequence of that, your Honor, we have a very large supply of grit out at this particular site which we are not able to sell to the Frey people because they won't buy it.

On the other hand, they insist on us selling the gravel and they insist on us keeping on producing this material and producing more and more grit. I think the inequity of the situation and the impropriety of requiring us to do that is very clear, so one of the elements of relief that I am requesting here today, aside from the adjustment in the prices that we have sought, is that the Frey people, if they insist upon requiring us to provide them with gravel on the basis that the order provides for that they are also required to buy the grit.

I think you may hear some arguments,

as I mentioned, that the grit is not of good quality and that is why they stopped using it. The plain answer to that, your Honor, is that they were buying the same grit for years previous to that time. There were no complaints and no problems and I think that is a device or a ruse to get out from under the obligation. Apparently, they found some other cheaper source that they would like to take advantage of or a more convenient source and they want to have half of this cake and not the whole cake, but not give up the entire situation.

I think another answer to it very quickly is that Pine Hill uses this same grit in its own ready-mix concrete so it is usable and of quality materials and we haven't had any problems with it so the reason that we are here this morning, in essence, your Honor, is to update that June 9, 1971 order to current prices and to require Pine Hill, - or Frey, if they want to buy these materials from us, to buy all the materials from us at those

prices less the discounts and to require them to pay an increase in the amount of the trucking. Your Honor provided that there be a trucking charge placed in escrow of seventy cents per ton in 1971 and our independant truckers have raised their prices to us by the amount of twenty cents per ton. I think Mrs. Muck, who is an officer of the plaintiff corporation has admitted in her affidavit that there certainly has been increases in trucking costs, but they object to paying any increased cost to us. I might say that these increased costs that we have to pay to these truckers we do not mark up on it. Those are pass through things that are wash-out items so we don't make any profit on that and if we don't get what we are being charged, in effect, we are losing the difference, so I ask that those prices be changed and increased to the current amounts. I ask that the order provide that Frey be required to purchase its requirements of both sand or concrete sand and grit and also gravel from us if they are

going to purchase anything and require us to sell anything, and I ask further, your Honor, that during the pendancy of this action and since there is a material issue and the real issue here is whether or not they are entitled to buy from us at these heavily discounted rates, that is the twenty per cent plus two per cent discounts, I ask further that some order be entered requiring the amount of those discounts which they are now taking to be put in escrow and held in escrow pending a determination as to whether or not those were proper discounts to be forced upon us because in my view, this case could well end up with a determination by this Court that they were not entitled to the twenty plus two per cent discounts and then we have a situation where they have kept them. We haven't got the money and according to their papers here, we see dire predictions of their financial picture and I would hate to end up at some time in the future with a claim against a defunct corporation and I think, in all fairness, that there ought

to be some provision, whether it be in escrow or whether it be a security bond to make sure that this thing that we are talking about, fighting about here, this twenty plus two per cent thing be kept in escrow or held in abeyance for the determination of this matter. Thank you, sir.

THE COURT: Mr. Weiss.

MR. WEISS: Your Honor, I do believe that testimony is necessary. Mr. Fuzak has none, we have quite a bit. I can make some opening remarks.

THE COURT: Why don't you make some opening remarks.

MR. WEISS: And I will refer to many of the things Mr. Fuzak said, because they are new to me and almost trying to put the shoe on the other foot, but I would like to have one thing clear right now in your Honor's mind if Mr. Fuzak is offering it because I think Mr. Fuzak has apparently offered this and I don't think he will retract it. If he is willing to stipulate right here and now that we have to buy one

hundred per cent of our requirements under this contract and this contract is in effect, continues in effect for the remaining term of it which is another four or five years, we are all prepared to do it and we will comply with the contract and we will guarantee, - he has got to sell us merchantable material, of course, and we will have safeguards to see we are not being arbitrary in rejecting any of the material, we will guarantee right here in court to buy and comply with every single paragraph and word of that contract. Is that satisfactory, Mr. Fuzak?

MR. FUZAK: Of course it isn't, Mr. Weiss. I am not going to stipulate that that contract is in effect or remains in effect or that we are going to be acting pursuant to it. At the present time, we are acting pursuant to an order of the Court and that is what we are talking about here, your Honor, an order of the Court requiring us to make these sales, but it is based on their reading of the contract which did require them to buy both sand and gravel and not

have their choice.

MR. WEISS: We get back to the contract, your Honor. This is not essentially a breach of contract action. This is an antitrust action and the contract is being used as a weapon by the Pine Hill people and we have to go back to review where we started and where we are. I know it has been a long time since your Honor had this case before him so I will try to be brief but I will try to refresh your Honor's recollection that Pine Hill and Frey have been in business each perhaps twenty-five years. Pine Hill has been in business a little longer.

Pine Hill and Frey have always been competitors in many ways, they compete and they are competing for the same customers. They are competing in the same area. They are prime competitors and they are the two largest competitors in this business in Buffalo. Pine Hill has always been a larger company than Frey. Our contention is in this case that Frey would have been, because of its superior customer acceptance,

superior service and superior ability and I think we can offer proof on this, would have been and exceeded Pine Hill but it would have at least kept going at its then current growth rate.

Pine Hill and Frey had no business relationships. We were competitors and we were competing and then one day Pine Hill went out and bought Frey's gravel supply. No one told them to do it. We didn't tell them to do it and we say that was a prime predatory act. Historically and classically condemned. They bought the source of supply of the principal component of our product that we compete with them and that is why we are here today. We didn't make this contract with them and that's why I asked in the beginning of this are they here speaking for the people we made this contract with. We made this contract with someone else. Four brothers named Pfohl. They were in the concrete business. They were not competing with us and the ridiculous result is now that these people even on the site on which our concrete

plant is sitting. This is an antitrust case. It is a trouble damage case and there is a contract here and I would like Mr. Fuzak to understand that.

Now, we say that Pine Hill has put every predatory practice it could muster against us and we say that this motion also is part of the implementation of that policy and we are prepared to show on the stand why it is. One of the prime examples of what is going on here, your Honor, is I haven't had any discovery yet. I cannot tell your Honor right now - -

THE COURT: Mr. Weiss, I made the order back in 1971 and I am going to say again and I am not going to say it one more time. This Court, as you can see by the way we have addressed ourselves to this motion, is ready to pick up on the motions made and decide them as speedily as possible. Since 1971, - I don't know what the reason was, I don't know what the cause is, but little discovery has gone on. That was either because the parties agreed to it and if it was not because you agreed to

it during the intervening time if the other side improperly violated the order, you had the right to come here and you did not. I am going to make an order today. I am going to make an order today that this matter is going to be referred to the Magistrate to supervise discovery and in the order I am going to direct the Magistrate to supervise it if he finds it necessary on a day-to-day basis. The only way this case is going to be disposed of is for both sides to get at the discovery and to complete it and since the parties will not do it, I am going to see to it that it is done. I do not want anymore talk about how the other side didn't discover and how you weren't able to take depositions and so forth. We are here on a very narrow issue today. I appreciate your bringing me up to date on the history because on both sides the history is important. The only question we have today is whether or not the orders of May and June of 1971 concerned with the direction that a certain price ought to be paid for

gravel in the interim, in the interim, should be modified and that is all I have.

MR. WEISS: Your Honor, this is why it is important. This is a simple question. Maybe Mr. Fuzak can answer it. My discovery would have, one of its first things would have asked, - I am not trying to harp on this, but one of the things I would like to know is who is selling the gravel. Is it Pine Hill or is it their subsidiary or affiliate or a company we believe related with them which is a defendant, Regent Sand & Gravel. We don't even know that right now.

MR. FUZAK: I will answer that question, Mr. Weiss, if that is important. Pine Hill is selling it.

THE COURT: All right. Mr. Weiss, again, this case was filed in 1970. It seemed to me that if that was an important question to ask, it could have been asked a long time ago and under the rules which are set out most clearly and which you are most familiar with because you are a skilled practitioner here in many cases, the

information could have been spread out on the record.

MR. WEISS: I will drop the subject, your Honor.

THE COURT: All right.

MR. WEISS: I do believe that I have made what I consider to be three applications to this Court for leave to go ahead myself. Mr. Manz who has been handling the case up to now has taken the position that we get that last item or you don't move. Now, I would ask your Honor, in referring it to the referee, if you would just do this one thing and then I will be silent; let us proceed now with some discovery on our part. Let the first part go forward from our part so we can get up to a level that I can even intelligently address your Honor on this motion. I can't do it for this reason.

THE COURT: Mr. Weiss, I am going to send it to the Magistrate. He is going to supervise and I know that you and Mr. Fuzak have had extensive experience with Mr. Maxwell and you know that he will supervise and that as far as your going forward, if that

is the proper thing to do he will do it and he will see to it that it is complied with.

MR. WEISS: I just want your Honor to know that on this motion, I do feel, I do believe that I cannot intelligently address it in all respects to protect my client because I do not have enough information, but I will do what I can. On the antitrust level about this motion, Pine Hill, through Mr. Fuzak, has made reference to a defunct corporation and perhaps it is a Freudian slip on his part, because, your Honor, this will be a defunct corporation, the plaintiff in this case, unless something happens to it for this reason; Pine Hill is supplying its own gravel. Apparently, Regent Sand & Gravel is a subsidiary which produces the gravel and delivers it to Pine Hill. I don't know what Pine Hill is being charged by Regent. I don't know if Pine Hill is making a profit on Regent. I don't know if Pine Hill is selling it to us at the price it pays its subsidiary Rengent.

These are some of the questions we have to ask. I don't know if Mr. Fuzak can tell us or not.

THE COURT: Mr. Weiss, let us return to the problem here today. The reason that this order was put out in the first place was that the Court had certain orders directing that discovery go forward. They were not complied with. It seemed to me that some sanction had to be brought to bear. Maybe it hurts both sides, and in making and judging the rights or wrongs of this thing, the Court was also troubled by not having enough information, but it seemed to me that something had to be done and something had to be done and I thought that that kind of an order would accelerate the discovery and evidently, it has failed, but that is the only reason we are here now today. We are not here to try the lawsuit.

MR. WEISS: Let me continue - -

THE COURT: We can't try the lawsuit until you get your discovery.

MR. WEISS: That is correct, your Honor.

THE COURT: So therefore, I think that because of the fact that, as certainly we all know, the price of everything has gone up.

MR. WEISS: I will agree with that, your Honor.

THE COURT: There ought to be a change in the order.

MR. WEISS: I think your Honor should listen to our evidence before you make that decision because I think your Honor is unaware of certain things that are applicable to this case.

THE COURT: All right.

MR. WEISS: The price of gravel in other gravel pits has not gone up. That is point number one, basic point number one and we are here today prepared to prove that unless Mr. Fuzak would like to stipulate to that.

MR. FUZAK: Mr. Weiss, please don't ask me to stipulate to things constantly. Conduct your argument as you will.

MR. WEISS: That is one item we offer to prove here today. If there has been an increase in any case, it is a very minor increase. We are prepared to prove that. Mr. Fuzak

talks about a twenty per cent discount which he says - -

THE COURT: We get to another thing and I suppose I am just opening up another can of worms here, but why insist upon dealing one with another if you cannot agree. Why not go somewhere else.

MR. WEISS: Well, your Honor - -

THE COURT: I think we have had discussion about this before.

MR. WEISS: We have had, and here is our position on that, your Honor. We need this source of supply of gravel. We had a gravel plant. Historically, Frey bought a gravel plant. Pfohl came along and said, "Look, I am in the gravel business, let me handle your requirements. You give me your gravel plant and I will make sure you have the cheapest best gravel you can buy so you can compete with all your concrete people, including Pine Hill". Pine Hill also had its gravel plant too, apparently using this Regent Sand & Gravel type of thing so the parties were equal. We had Pfohl and we had low cost gravel. They had

their low cost gravel. A contract which was negotiated had a twenty per cent discount in it and had provisions that Pfohl agreed he would deliver the gravel and put it in our bins right from the plant which was right next door and give us the opportunity to compete. That was fine until they bought Pfohl. Now, if they bought Pfohl, this competitor of ours bought Pfohl, I think that is a per se violation.

THE COURT: In other words, the point is that if you went out on the market and bought it somewhere else, then you wouldn't have the benefit of the twenty per cent discount.

MR. WEISS: No. We would have the benefit of more than a twenty per cent discount. We are also prepared to prove that today.

THE COURT: Then, Mr. Weiss, if that is the case, then why not buy elsewhere.

MR. WEISS: May I?

THE COURT: All right.

MR. WEISS: The twenty per cent discount is nothing discriminatory or exorbitant. It is freely offered by other gravel producers

in the industry, twenty per cent discount or even more than twenty per cent discount is freely offered and we are prepared to prove that today by other gravel producers to people who buy volume and so Mr. Fuzak is doing nothing more for us than Pfohl agreed to do because he knew the custom and usage. What the problem is that the so-called published posted list price that Pine Hill is now saying, "We put up", that is exorbitant. If you took twenty per cent off of that or thirty per cent or forty per cent, the problem is that the contract had the arbitration machinery. It had a type of negotiation machinery in it to take care of this problem. Each year, Pfohl agreed, "Look, here is my price". I am sure they are going to have cost increases and I am not telling your Honor that there aren't cost increases. He said, "Here is what the price should be this year. We have two months to negotiate the price", and Pfohl and Frey would get together back and forth and they would arrive at a price for the year

and that went on until Pine Hill came in the picture. We haven't had the first meeting with them, no negotiation with them. The price is set by them. Now, the horrendous part of that is conceded in their papers before your Honor today They have conceded and it is right in the papers. We don't need to offer any proof, although I would like to ask them a little more about it, they conceded that these published posted prices are all a facade. They are for us. We are their largest customer. We buy almost all of their gravel and they want to sell us more. By putting a published list price up, they are just saying, "This is our price to Frey". They sell their gravel to two people, your Honor, Pine Hill and us. I don't know even if they are charging themselves that price. If they are, they are making a profit on it.

THE COURT: Mr. Weiss, I am not going to try the lawsuit here. If you have some testimony, let us have the testimony.

MR. WEISS: All right. Is it clear then that

Mr. Fuzak is offering none in support of his application?

THE COURT: You have the affidavits, right?

MR. FUZAK: Yes, I have the affidavits, your Honor, but I'm not saying that I won't offer testimony in rebuttal if that is necessary.

MR. WEISS: Your Honor, at this point then if Mr. Fuzak is relying on the affidavits, I move that the application be denied.

THE COURT: I will deny your motion. I think I can consider the affidavits in this kind of an application.

MR. WEISS: All right, Mrs. Muck.

L O I S M U C K (6554 Utley Road, Akron, New York), a witness called by and in behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WEISS:

Q Mrs. Muck, state your position with Frey Concrete?

A I am secretary and treasurer.

Q And are you, - do your duties include having to do with the operation of the business including the sale of concrete, the purchase of components of concrete

such as cement, gravel, et cetera?

A. I am aware of what is going on in the corporation.

Q. Mrs. Muck, very briefly could you tell me, in the Buffalo area, what companies are the largest suppliers of concrete, which is the largest supplier?

A. I would say would be Pine Hill and Frey would be almost at a par with one another.

Q. And are there any other - -

THE COURT: They are the largest suppliers?

THE WITNESS: Yes.

BY MR. WEISS:

Q. And do they supply the majority of the concrete in this area?

A. They have a percentage of the - -

Q. No, Pine Hill and Frey together, do they account for a substantial majority of the concrete, ready-mixed concrete in the Western New York area?

MR. FUZAK: Excuse me, Mrs. Frey. I am going to object to that question, your Honor, unless some foundation is laid to show that this woman knows or how she comes to such a conclusion, if she has one.

THE COURT: You are active in the business, is that it?

THE WITNESS: Yes, I am.

THE COURT: Is it Mrs. Muck?

THE WITNESS: Yes.

THE COURT: Mrs. Muck. I suppose you keep abreast; do you try to find out what your competitors are doing?

THE WITNESS: Yes, I do.

THE COURT: Who are the other people that supply concrete, ready-mix concrete in the Buffalo area outside of your company and the Pine Hill Company?

THE WITNESS: The other union and company in this area would be Clarence Ready-Mix Company.

THE COURT: Any others?

THE WITNESS: There are some others that are in the area, Reifler.

MR. WEISS: Those are non-union.

THE COURT: I do not care whether they are union or non-union. What I am concerned about is how do you come to the conclusion that you and Frey are the largest suppliers of concrete and how do you come to the conclusion, - if you are going to give a percentage, how you arrive at the percentage. It would not matter whether it is supplied by union or non-union people

as far as I am concerned.

THE WITNESS: Well, just I know that we are the two larger companies in this area and when I was talking of percentages, perhaps you didn't understand what I meant. I think that we would, the two of us, would be, - would probably be equal in the amount of volume that we haul.

THE COURT: How do you come to a judgment about how your volume relates to all of the concrete produced in the area? Do you read journals or is there some report in newspapers; is there some way you can get this information through talking to other people in the business; how do you arrive at your conclusions?

THE WITNESS: By talking to other people in the business, by the reports that our salesmen give to us, by reading different papers that are about.

BY MR. WEISS:

Q You also bid on various jobs?

A We bid on all the large jobs.

Q And you see who gets those?

A. Right.

THE COURT: All right, go ahead, Mr. Weiss.

BY MR. WEISS:

Q. In the total concrete, ready-mix concrete market or sales in Western New York, what percentage does Frey and Pine Hill together have? You say they are equal, but approximately what is the total?

MR. FUZAK: Excuse me, please. I have an objection to make. First to the form of the question because I think it is indefinite as to what Mr. Weiss means by "Western New York market", and second, on the grounds that this witness has not shown that she has any basis for having a judgment as to percentages or otherwise.

THE COURT: Overruled, but I would think that we ought to define what you mean by "Western New York market".

THE WITNESS: It would be the Buffalo area and the outlying towns, say generally, in Erie County.

THE COURT: What about Niagara County, North Tonawanda, Niagara Falls.

THE WITNESS: We would go into North Tonawanda,

Tonawanda, yes. Occasionally into Lockport.

THE COURT: All right. What is the percentage of Frey and Pine Hill of all of the business?

THE WITNESS: Judge, this is an answer that I am not really equipped to give you an actual perentage.

BY MR. WEISS:

Q Let me put it to you this way; do you know or do you have an opinion of whether Frey and Pine Hill together have less or more than half of the total business in the area?

MR. FUZAK: Excuse me, Mrs. Muck. I object to the question.

THE COURT: I will sustain the objection.

THE WITNESS: I am sure that they have.

MR.FUZAK: Excuse me.

THE COURT: I have sustained the objection, please, Mrs. Muck. Listen to the question.

THE WITNESS: Okay.

BY MR. WEISS:

Q Could you give us, could you give his Honor an idea of

the size of the other competitors relative to Pine Hill and Frey?

A. I would like to do a little study on that. I am not really qualified to do that. I better say "no".

THE COURT: Mrs. Muck, this isn't the final end of the lawsuit. As I have tried to indicate, it is sort of an informational hearing so that I may make some kind of an interim order here so you don't know. Next question, please. Let us go on to something else. Mrs. Muck says she is not familiar with these general figures.

BY MR. WEISS:

Q. Mrs. Muck, is gravel a component or what is known as an aggregate component of concrete?

A. Yes.

Q. In the, - there is grit in each yard of concrete that is delivered. There is automatically concrete grit in it. All right. How much grit is there, usually, in a yard of concrete?

A. Just to give you a rough idea, I would say about fifty per cent grit and fifty per cent of some other aggregate.

Q. All right, and is that other aggregate, could that be gravel or slag or some lightweight material for special

applications?

A. It can be gravel, slag, crushed stone and it can be lightweight materials.

Q. What aggregate does Pine Hill and Frey use for their concrete?

A. I know what we use for ours.

Q. And what is that?

A. That is concrete grit, gravel, crushed stone and haydite and there are others.

MR. FUZAK: I am sorry, what was the last?

THE WITNESS: Haydite. That is a lightweight and there is others that are just odd things.

BY MR. WEISS:

Q. Now, did you purchase your supply of gravel from Pfohl Brothers since in or about 1949?

A. Yes, we did.

Q. And did there come a time in 1957 or '8 when Pine Hill or the defendants in this case acquired the Pfohl gravel operation?

A. Yes. They acquired it, I believe, in 1957.

Q. Yes, and did they continue to supply you gravel?

A. They continued to supply us gravel at our Peppermint Road plant under the same conditions as our original contract.

Q. Now, did you, in the interim, erect a plant in West

Seneca known as your West Seneca Plant?

A. We erected a plant in West Seneca prior to '57 and at that time, we asked Pfohl Brothers to supply us, - that plant and they said they were not able to.

Q. They didn't have the ability to?

A. Right.

Q. Has Pine Hill ever offered to change that decision or supply you at West Seneca?

A. No, they haven't.

MR. FUZAK: I object to the question on the lack of relevance, no requirement that we - -

THE COURT: I will overrule it. Mr. Weiss.

BY MR. WEISS:

Q. Now, did you prepare a chart at my request here?

A. Yes, I have a chart prepared.

MR. WEISS: May we mark that?

THE COURT: Have Mr. Walsh mark it.

MR. WEISS: For identification, please.

THE WITNESS: I believe I gave you one chart.

MR. WEISS: Do you have another one?

THE WITNESS: No, I don't.

MR. WEISS: I will have to use mine. I am sorry, Mr. Fuzak. You can look at mine. We only have one more.

MR. FUZAK: May I just look at it then before you start questioning, please. Thank you.

BY MR. WEISS:

Q Now, could you tell me in the year 1967, what was the published pit price for grit and gravel which you paid to Pine Hill, the successors to Pfohl?

A In 1967 we paid $2.20 was the prevailing pit price less our discount. You didn't ask for the total.

Q That gave you a net price of what?

A A dollar seventy-two and a half cents. That would be for grit, and for Number 1 gravel, the pit price was two forty. Our net price was a dollar eighty-eight point two and for Number 2 gravel, pit price was two twenty. Our net price was a dollar seventy-two and a half cents.

Q All right, and at that time, were you buying - -

THE COURT: Mrs. Muck, I think I understand this. Do you have the form in front of you?

THE WITNESS: Yes, I do.

THE COURT: Under concrete grit, you have the figure twenty per cent plus two per cent adjusted.

MR. WEISS: No. The adjusted goes in the next column, your Honor. That should be adjusted Buffalo net price.

THE COURT: That is one of the questions. The pit price, is that reduced by twenty per cent plus two per cent?

THE WITNESS: When you have the net price, that is reduced by twenty per cent plus two per cent.

THE COURT: Evidently, the pit price is reduced to one seventy-five or one seventy-two and a half and how does that come about?

THE WITNESS: By taking the pit price, which is two twenty, deducting twenty per cent and taking a two per cent discount.

THE COURT: All right. That is what I thought. What do you do, apply that again to get the adjusted Buffalo net price?

THE WITNESS: No.

MR. WEISS: That is a different concept, your Honor.

THE COURT: Will you please let the witness explain.

THE WITNESS: The adjusted Buffalo net price was an adjustment that I tentatively made for, - in case, - if Pine Hill wasn't the only company in this area and had the monopoly in this area and if General Crushed Stone

in Machias was in this area I made an adjustment.

THE COURT: Mrs. Muck, under adjusted Buffalo net price - -

THE WITNESS: Yes.

THE COURT: Under defendant Pine Hill - -

THE WITNESS: Right.

THE COURT: You have no figures there.

THE WITNESS: That's right.

THE COURT: So that just doesn't apply, is that right?

THE WITNESS: It doesn't apply.

THE COURT: Okay. When we go over to Number 1 gravel, it is apparent that the difference between pit price and net price is brought about because there you also apply a twenty per cent plus two per cent discount.

THE WITNESS: Right.

THE COURT: Right?

THE WITNESS: That is correct.

THE COURT: And the same for Number 2 gravel?

THE WITNESS: Right.

THE COURT: Go ahead, Mr. Weiss.

BY MR. WEISS.

Q You probably heard Mr. Fuzak, in his opening remarks,

state that grit and gravel are produced from the same bank run material. Do you recall that?

A. Yes.

Q. Do you agree with that?

A. Yes.

Q. Mr. Fuzak also stated that when you produce, you don't produce plain grit, you don't produce plain gravel, you get a combination or a mix of the two from the average ton or yard of bank run material. Is that also correct?

A. That's right.

Q. Now, Mr. Fuzak also stated that generally you arrive at a production yield of say, sixty per cent grit and about forty per cent gravel out of each unit of bank run material. Will you agree with that or if you have a different idea, let us know.

A. I thought it was more like 50/50, but that is just a minor dispute.

MR. FUZAK: I will move to strike the response because I don't think there is any foundation to show that the witness knows what it should be.

THE COURT: I will let it stand.

BY MR. WEISS:

Q. Now, Mrs. Muck, there are two different kinds of gravel

used in concrete, Number 1 and Number 2 gravel, whether you have 60/40 split between grit and gravel or 50/50 of the component that you get out of the bank run, how does the Number 1 and 2 vary in there? Do you get about the same or are they different?

A I don't understand exactly what you mean.

THE COURT: Mrs. Muck, there is a difference? What do you mean by Number 1 gravel?

THE WITNESS: Number 1 gravel is what we commonly refer to as pea stones. It is smaller.

THE COURT: Smaller.

THE WITNESS: Right.

THE COURT: Number 2 gravel, what do you mean by that?

THE WITNESS: That is larger than pea stone.

THE COURT: Larger?

THE WITNESS: Yes, inch and a quarter, I believe.

THE COURT: When you get the gravel and grit together, how much is Number 1 as a rule and how much is Number 2, or does it vary from place to place and time to time?

THE WITNESS: It will vary from place to place and time to time from the bank that you are taking it from.

THE COURT: All right.

BY MR. WEISS:

Q. You don't have an opinion then about an average you might expect?

A. No, sir.

Q. Now, do you always use Number 1 gravel in every yard of concrete and do you always use Number 2 gravel in every yard of concrete?

A. No. We can use crushed stone in a yard of concrete. We can use a lightweigl in a yard of concrete.

Q. Assuming you use gravel, do you use both Number 1 and Number 2 gravel in each yard of concrete?

A. It depends on what that particular yard requires.

Q. I see, so for some applications, you would use Number 1 gravel and for other applications, you would use Number 2 gravel?

A. Yes.

Q. Do you determine that or does the customer determine that?

A. The customer will determine what he wants.

Q. Well, for example, what type application do you use Number 2 gravel?

A. Number 2 gravel would be used in walls along with some of the Number 1 gravel. You would have to make a combination there, a little of Number 1 and some Number 2 in the walls, wall mixes.

Q. The heavier type construction uses Number 2, is that it?

A. That's right.

Q. All right. Now, concrete grit is present regardless in each yard of concrete?

A. Yes, it is.

Q. Even if you use slag as an aggregate or you use crushed stone as a major aggregate?

A. Yes, grit is used.

Q. And you said it is on the basis, you use about half grit and half of the other aggregate?

A. That is just a rule of thumb, yes.

Q. Now, did you, in 1967, at your Lancaster plant, purchase grit or gravel from anyone else other than Regent Sand & Gravel or Pine Hill?

A. We purchased our materials from Pine Hill or Regent, whichever it is and then if we had calls for a specific aggregate where our specifications would say "crushed stone", we would have to use crushed stone in that or if it would require us to use a special gravel from another pit which we quite often get specified sources that we have to use, it would have to come from that source, but most of it, let's say our - -

Q. Aside from special requests.

A. Aside from special requests, our gravels came from

Pine Hill and our grits.

Q. Now, in 1968, did you also purchase your grit and gravel from Pine Hill at the Lancaster Plant?

A. Yes, we did.

Q. Now, at the West Seneca Plant you told us that Pfohl told you to go elsewhere, he didn't have it for you?

A. Yes, that's right.

Q. Do you have any other plants besides those two plants?

A. No.

Q. Now, in 1968, did you purchase all of your grit and gravel from Pine Hill?

A. Yes, yes.

Q. Now, in 1968, did there come a time when Pine Hill sent you a notice that they were increasing the price of grit and gravel.

A. Yes.

Q. And what was the proposed price increase that Pine Hill made in grit and gravel in 1968, the pit price?

A. The pit price in 1968, grit was $3.20. Number 1 stone, $2.50, and Number 2 stone $2.30 less our discounts.

Q. I know it is a matter of arithmetic, but was that approximately a fifty per cent increase in the price of grit or a dollar a yard or a ton increase in the price of grit and only a ten cent increase of the pri of gravel?

A That's right.

MR. FUZAK: If your Honor please, I would move to strike this testimony, this line of questioning on the grounds that Mr. Weiss is now apparently attempting to try his lawsuit. He is going back to 1957, as I understand.

THE COURT: He is covering this quickly. Can we move up a little bit?

MR. WEISS: It is going very rapidly, your Honor. I did want to ask Mrs. Muck. Well, I am not going to cover, your Honor, - at this point, there were various disputes and I am going to ask only this question, did she attempt to have a meeting or did she meet with Pine Hill to negotiate or discuss this proposed price increase?

THE WITNESS: We tried several times to try to contact Mr. Kahle. At one time, Mr. Frey and myself met with Mr. Moran, but Mr. Moran and Mr. Mark Kahle, at the time we met with Mr. Moran and Mr. Mark Kahle they were not in a position to negotiate with us because Mr. Ludwig Kahle was not there.

BY MR. WEISS:

Q Well, did they say that?

A This is what happened.

MR. FUZAK: May I ask, - I don't mean to interrupt, but you said Mr. Frey. Could you tell us which Mr. Frey?

THE WITNESS: Mr. Herbert Frey.

MR. FUZAK: Is he your brother?

THE WITNESS: Yes.

BY MR. WEISS:

Q Now, did you pay during 1968, the price increase requested?

A No, sir, we didn't.

Q As a result of that, in 1969, did Pine Hill refuse to sell you unless you would pay the increase? Did you refuse to pay the increase and they refused to sell you?

A That is right.

Q Now, thereafter, this litigation was started. Now, in 1970, did Pine Hill give a notice of a further price increase?

A Yes, they did.

Q And that raised, - is that shown on your chart, Exhibit 1 for identification, raising the grit price from three twenty to three fifty and the gravel price from

two fifty for Number 1 to $3 and for Number 2 from two thirty to two seventy-five?

A. Right.

Q. Now, did you buy any grit or gravel from Pine Hill during the years '68, '69, '70 or 1971 up to his Honor's order in June of 1971?

A. Would you repeat that, please.

Q. Did you purchase grit or gravel from Pine Hill in '69 after they refused to sell you up to his Honor's order in June, 1971?

A. We started to buy grit from them after the Court order.

Q. All right. That was in June, 1971?

A. Right.

Q. And did you then buy your grit and gravel requirements aside from special specifications at the Lancaster Plant under the Court order?

A. Right.

Q. Now, the price in the Court order, I believe, was the price you have listed here as the 1970 to '74 price, is that correct?

A. That is right.

Q. And can you tell the Court, although I think it appears from Mr. Fuzak's statements, who is, - to whom Pine Hill sells gravel besides itself for its own use, who is their major customer?

A. We are their major customer.

Q. Is there any large concrete company that is purchasing gravel from them?

A. No.

Q. And these are the largest users of gravel, I take it.

A. Yes.

Q. Now, in 1974, did Pine Hill send you a notice of a further price increase?

A. Yes, they did.

Q. All right. Now, under the contract, this is required to be sent at what time?

A. By February 1st.

Q. Did you receive this by February 1st?

A. No, we didn't.

Q. And this proposed price increase did not propose to increase the grit price at all, is that right?

A. That's right.

Q. But it did increase the gravel price by fifty cents a ton, is that right?

A. That is right. Yes, that is right.

Q. Now, during the time that the Court order was in effect, did you cease buying your grit from Pine Hill and then for a period of time, did you cease buying your gravel from them and then resume?

A. Yes.

Q Tell the - -

A We had trouble with their grit. They supplied us materials that were dirty and had some different odd things in it that wasn't suitable for our use and it was so wet that it bridged over in our bin that we had difficulty in loading our trucks. It was really quite a problem.

MR. FUZAK: If the Court please, I move to strike that answer because I think it was shown before that this witness is not qualified to give that type of testimony. I think she indicated at the outset that these areas were not part of her duties, but somehow she has general knowledge of what goes on in the corporation.

THE COURT: I will overrule the objection and let it stand.

BY MR. WEISS:

Q Well, do you notice these things yourself?

A Yes, sir.

Q And did you make attempts to have Pine Hill correct these?

A Yes. I went down and talked to Mr. Jones personally and he made an effort, but it wasn't enough.

Q And then you had to buy - -

A. Our grit from someone else?

Q. And you have been buying it since from someone else?

A. Yes, we have.

Q. When did this change come about when you started buying grit from someone else?

A. I can't give you a date.

Q. All right. It was sometime after the court order?

A. Right.

Q. If Pine Hill would produce satisfactory grit and give it to you or give you satisfactory grit, would you purchase it today?

A. Yes, we would.

MR. FUZAK: I object to the question, your Honor.

THE COURT: I will let it stand. Can we go on, Mr. Weiss.

BY MR. WEISS:

Q. Yes. When you went elsewhere to purchase the, - strike that out. Did the time come when you had problems with the gravel and was that a temporary situation?

A. Yes. We had trouble with the gravel and we complained about it. We had to stop use of the gravel for just a short time, but Mr. Jones did [illegible]e to get the gravel back into a reasonable good condition.

MR. FUZAK: I am sorry, Mrs. Muck. I move to

strike that testimony. That is highly conclusiary, making statements like, "We had trouble with the gravel and something was done", and so forth.

THE COURT: Overruled. I will let it stand.

BY MR. WEISS:

Q Could you tell us why the problem with the gravel or the grit, why that would affect you, how that affected the concrete?

THE COURT: I think it is obvious that if they received bad material it could hurt their business some way.

BY MR. WEISS:

Q From whom did you purchase your grit and your gravel during these periods of time?

A We have purchased materials from Granat.

Q Is that Dan Granat.

A Dan Granat, yes, and from General Crushed Stone and Buffalo Slag Company.

Q Okay. Now, are these big suppliers or small producers?

MR. FUZAK: Object to the form of the question, your Honor, as being entirely speculative and indefinite.

THE COURT: He is going to ask another question.

BY MR. WEISS:

Q Were these companies in business or major suppliers of stone before you started dealing with them?

A They were suppliers of gravel products in this area.

Q What I mean is they were in business before you started to deal with them?

A Yes.

Q In size, could you give us some idea of their size?

THE COURT: I don't know whether the size makes any difference. Were they able to supply your needs?

THE WITNESS: Yes, they were.

THE COURT: Where is Dan Granat located?

THE WITNESS: In Collins.

THE COURT: That is about how many miles from Buffalo, from your particular concrete plant?

THE WITNESS: I am sorry. I can't give you miles.

THE COURT: You don't know?

THE WITNESS: No. I could take you there. I am sorry, I am not aware of the miles.

THE COURT: It is some distance?

THE WITNESS: Yes.

THE COURT: Is it thirty or forty miles?

THE WITNESS: I don't think it is that far.

THE COURT: But the Machias Plant is further than Collins; it is in Cattaraugus County?

THE WITNESS: In Machias, yes.

THE COURT: Maybe on the border of Erie County near Springville?

THE WITNESS: It is, - you have to go off the main drag to get to Springville. Arcade is closer.

THE COURT: Near Arcade, all right. Buffalo Slag is in Franklinville?

THE WITNESS: Right.

THE COURT: That is further?

THE WITNESS: Franklinville and Machias are very close together.

THE COURT: Very well.

BY MR. WEISS:

Q All right. Now, can you tell us if each of these companies that you purchased from had a posted pit price for their gravel and grit products?

A Yes, they do.

Q And have you listed here for the years involved the posted pit prices for grit and gravel of Dan Granat, General Crushed Stone and Buffalo Slag?

A. Yes, I have.

Q. I notice you have not put the gravel prices for Dan Granat. Can you tell us the reason?

A. We never buy gravel from Granat.

Q. But you do buy and did buy grit and gravel from these people here?

A. Yes, we do.

Q. Except now you are not buying gravel; you are buying from Pine Hill; the problems with the gravel have cured, so you are buying gravel from Pine Hill now?

A. Yes, for the Lancaster Plant.

Q. Now, did you ask these people, Dan Granat, General Crushed Stone, Buffalo Slag for a discount for your purchases?

MR. FUZAK: I object to that, your Honor. That is hearsay, as far as we are concerned.

BY MR. WEISS:

Q. Well, I will put it another way. Did you receive a discount?

A. Yes, we have.

Q. And have you listed the discounted price also on this chart, Exhibit 1 for identification?

A. Yes, we have.

MR. WEISS: Your Honor, I would just like to

state that there is no place on here where it is computed, but it is obvious there is a very substantial discount.

THE COURT: Under Dan Granat, is this indicated, the 1974, under the adjusted Buffalo net price $2.06?

MR. WEISS: No, your Honor.

THE COURT: Oh, I see, under net price.

MR. WEISS: It is $1.65 what they are paying now.

THE COURT: One sixty-five, and that column, as far as Granat, General Crushed Stone and Buffalo Slag Company, the column indicated as net price is your discount, is that right?

THE WITNESS: That's right.

MR. WEISS: In other words, your Honor, that would show that for grit they would be paying Pine Hill two seventy-four and they are now paying Dan Granat $1.65 and they are paying General Crushed Stone a dollar thirty and Buffalo Crushed Stone a dollar thirty net.

MR. FUZAK: May I ask for clarification, sir, whether that is FOB at the pit.

THE COURT: We will cover that.

BY MR. WEISS:

Q. Are these prices FOB these various places?

A. Yes.

Q. Respectively, are these the prices shown for Dan Granat, General Crushed Stone and Buffalo Slag under 1974 that you are now paying for grit?

A. Yes.

Q. At those places?

A. Right.

Q. FOB these plants?

A. Right.

Q. Now, Mrs. Muck, did you make a computation in an attempt to adjust these prices to what you would consider to be a Buffalo price for these materials or a price if the supplier, the suppliers were in this area?

A. Yes, I did.

Q. Now, that answers that, all right, and is that shown under the column called adjusted Buffalo net price?

A. Yes.

Q. All right. Now, Mrs. Muck, could you tell us what you did and how you arrived, what considerations you took into account and how you made that computation?

A. Your Honor, I took into consideration that if Buffalo Slag and General Crushed Stone were in the Buffalo area and had their gravel resources in this area and

Pine Hill was not the monopoly of gravel in this area - -

MR. FUZAK: Excuse me.

THE COURT: Mr. Fuzak, let her finish the answer.

MR. FUZAK: I am sorry.

THE WITNESS: And I took into consideration that there is a difference in labor costs in the country as compared to the Buffalo area. Now, labor, generally represents about forty per cent of the cost of a ton of gravel. Now, just using it on a dollar figuring, it would be net a dollar and forty per cent of that would be forty cents per ton. Now, if, - knowing some of the difference in the costs of labor, I made an adjustment of about fifty per cent additional cost of labor that would be in the Buffalo area as compared to the area down in the southern tier and figuring it out, it figures out about twenty cents a ton. If you take fifty per cent of the forty cents, it would figure out twenty cents. Now, if you take into consideration too that maybe they would pay a little bit more taxes here in this area and probably - -

BY MR. WEISS:

Q You mean real estate taxes?

A. Real estate taxes, right, possibly the cost of land might be somewhat more valuable here in Buffalo. Of course, it is more valuable because in the Buffalo area they are using some of these gravel pits for disposal of garbage, so that, - I didn't even take that into consideration, so I made it five per cent for additional taxes, so I added on twenty-five per cent onto the cost because the cost of running the wash itself, the cost of gasoline, the cost of a highlift would be the same down there as it is here. You wouldn't pay any more for a highlift down there than we do here, so I figure twenty-five per cent more, so this represents twenty-five per cent more of the net figure.

Q What you are saying is that in your opinion, subject to your assumptions and your computations, that if Dan Granat were selling gravel in Buffalo in a competitive market and had the same union contract Pine Hill did, he would be paying, - he would sell it to you for $2.06 a ton?

A. Right.

MR. FUZAK: Excuse me, Mrs. Muck, please. I object to that question. That is calling for a conclusion from this witness.

THE COURT: I think, Mr. Weiss, without argument, it seems to me that there are so many assumptions in the witness's testimony here and I, you know, most generously permit everything to go in, but I just can't permit that to stand. I will not consider it and I just do not want anymore questions about it. I am not going to consider it.

MR. WEISS: May I just speak - -

THE COURT: No, Mr. Weiss. It is such a far out analysis, it just does not bear at this time any further testimony.

MR. WEISS: We respectfully make an offer of proof to prove - -

THE COURT: I have heard enough, Mr. Weiss. I am not going to hear any more of that. I think what is important is the pit price plus the cost of transportation of Granat, General Crushed Stone and Buffalo Slag to Buffalo. That is what counts, not some analysis based upon guesses at what labor costs are, guesses at what real estate taxes are, guesses at other factors which would go into what Granat might be

able to do if he was operating here close to Buffalo rather than down in Collins, New York.

MR. WEISS: Well, your Honor, one of the problems we have is that there is no other gravel supplier.

THE COURT: I am sorry. I made a ruling and let us go on. Let us get ahead with this hearing.

MR. WEISS: All right. May I have an exception, your Honor?

THE COURT: Yes.

BY MR. WEISS:

Q Has there been, Mrs. Muck, any increase in the price of grit or gravel which you have paid to these people in the last three or four years, checking your chart, if you would?

A No, the last two years.

MR. FUZAK: The last, - I am sorry, I didn't catch that.

THE WITNESS: Two years.

MR. FUZAK: Two years.

BY MR. WEISS:

Q. For example, the price of grit from General Crushed Stone has stayed at a dollar thirty since 1970, is that correct?

A. That's right.

Q. And Buffalo Slag, actually, the price went up and came down again, is that correct?

A. That's right.

Q. Number 1 gravel for Buffalo Slag, the price actually came down substantially, is that correct?

A. Yes.

Q. General Crushed Stone, the price of Number 1 gravel went up from 1970, - went down five cents and then up five cents the next year and up five cents the next year?

A. That's right.

Q. And those are the prices you are paying?

A. That's right.

MR. FUZAK: Excuse me, your Honor. Mr. Weiss and the witness are reading from an exhibit not in evidence, to which I take exception and, therefore, I except to the question.

THE COURT: As far as the prices, Mrs. Muck, that you indicated here for the years and the companies, these are what you were paying?

THE WITNESS: Yes.

THE COURT: Under pit price, that is what you tell us now without question that, for example, General Crushed Stone, in 1974, that their posted pit price was $1.85?

THE WITNESS: Yes.

THE COURT: But you were paying $1.30, right?

THE WITNESS: Yes.

THE COURT: Very well. I will accept it for the purpose of this hearing, Mr. Fuzak, but we can read. It is not necessary, Mr. Weiss, to analyze.

MR. WEISS: I understand. I will proceed, your Honor. At this point, I will offer - -

MR. FUZAK: I am sorry again, your Honor, but for clarification, do I understand you are not, however, accepting those figures which appear under the column adjusted Buffalo net price?

THE COURT: I will not, right.

MR. WEISS: Subject to that, your Honor, and reserving my exception to your Honor's refusal in that respect I would like to offer Exhibit Number 1 for identification into evidence.

THE COURT: I will permit Mr. Fuzak to question on this on the preparation of it.

MR. WEISS: We will continue then, your Honor.

THE COURT: All right.

BY MR. WEISS:

Q Mrs. Muck, if you can purchase concrete grit at a dollar thirty a ton and concrete gravel at a dollar twenty a ton - -

THE COURT: Mr. Weiss, look, let us not waste any time here. The price to Granat and these other places is FOB the pit. That means that you have got to pay the cost of transportation from Collins or Machias or Franklinville to your place here in Buffalo, is that right?

THE WITNESS: That's right.

THE COURT: You haven't shown those figures on the chart?

THE WITNESS: No, sir.

THE COURT: And that is a substantial part of the cost?

THE WITNESS: That is part of the cost.

THE COURT: Do you have those figures here?

THE WITNESS: I do not have them with me.

BY MR. WEISS:

Q Do you have an estimate of what it costs - -

MR. FUZAK: Excuse me.

THE COURT: I sustain the objection.

THE WITNESS: Judge, - -

THE COURT: I sustain the objection. I will not take an estimate. This is a substantial part of the figure and it seems to me to talk about what the pit price without considering the transportation costs is just, - we are just going to waste a lot of time.

MR. WEISS: May I make one observation to your Honor; the fact is, though, that these quarries or pits presumably have had the same cost increases as Pine Hill and they have not raised their pit price.

THE COURT: I don't know and this may be brought out, perhaps, on cross examination, - I do know one thing, because of prior litigation I have been involved in, that there are probably in Machias and Franklinville and many of the areas in Cattaraugus County that you can find

mountains of gravel and the difficulty is finding someone to sell it to and I don't know, we don't know what the economic situation was in those counties at that time, whether there was a lot of road construction. Then there would be a high demand and probably higher prices. If there is little road construction, then it would fall off and there are so many factors that go into this that we just cannot say since Dan Granat and the others did not increase price that Pine Hill should not increase price.

MR. WEISS: Well, your Honor, I offer this as an example. I can only offer our proof.

THE COURT: All right.

MR. WEISS: Our proof is that these people increased their posted pit prices slightly and they actually decreased their net price.

THE COURT: It is perfectly obvious from the chart.

MR. WEISS: It is also part of our contention that if there was any increase in transportation cost that is a separate request by

Pine Hill. They are asking that to be raised from seventy cents to ninety cents a ton and that does not form any part of this particular proof at this time, and, of course, if it cost Frey more to bring this gravel up here, that does not affect the cost at the quarry and I submit the best way to determine what happens at the quarry is to look at some independent.

THE COURT: Do you have some other questions?

MR. WEISS: If your Honor doesn't decapitate me, I would say that when I see Regent's books and Pine Hill books, I will determine, actually, if they had these cost increases.

THE COURT: All right.

BY MR. WEISS:

Q Now, Mrs. Muck, have you had any indication of any price increases by Frey, - by Pine Hill for his concrete during the past three or four years?

MR. FUZAK: Excuse me, your Honor. I object to that on the grounds of total lack of relevance. The concrete prices are not in issue here. What we are talking about are the grit and the gravel prices.

THE WITNESS: But sir, they are in direct competition - -

MR. FUZAK: Just a minute. I am talking with the Court.

THE COURT: We have enough arguers here now. Mr. Weiss, you say the price, if there is an increase in the price of concrete?

MR. WEISS: I say does she know whether Pine Hill has increased their concrete price in the last three or four years.

THE COURT: In other words, if they didn't, it would be one conclusion and if they did, it would be another.

MR. WEISS: Yes.

THE COURT: Do you know whether they did?

THE WITNESS: They have not increased their prices.

BY MR. WEISS:

Q Now, has Pine Hill informed any of your customers that they would continue to maintain their prices for the foreseeable future?

A Yes, they have.

Q Do you know of any, can you identify any representative of Pine Hill who has made these statements?

A Mr. Prusioso, for one.

Q. What is his first name?

A. Sam, I believe.

Q. Could you tell us, or give his Honor an example of a price, let's take wall concrete that you mentioned before, what is Pine Hill's present price for wall concrete to wall men?

A. The price for concrete to wall men is $22 a yard less a discount.

Q. And how long has that Pine Hill price been in effect?

A. Since 1971.

Q. Do you have wall customers?

A. We don't have very many anymore.

Q. Did you have to raise your price for wall concrete?

A. Yes, we did. We raised our price a dollar seventy cents a yard.

Q. When did you raise it?

A. The 1st of April, '74.

Q. What was your price before that?

A. It was $22 a yard.

Q. Are you, - did you decrease your price again to meet this lower price or this price of Pine Hill?

A. We are unable to.

Q. Now, what has been the effect on your business?

A. We don't have any, - we have lost most of our wall men. I think we have just three left.

Q Do you know who these people are doing business with?

A Yes.

MR. FUZAK: Excuse me, Mrs. Muck. I object to that. He asked her what the consequence of the price increase and she says, the witness says they have lost some customers or something like that. I don't think there is anything there to show that that was as a consequence of any prices.

THE COURT: We are not going to go into that. Continue, please, Mr. Weiss.

BY MR. WEISS:

Q You know who these customers are dealing with now?

A Yes. Many of them are dealing with Pine Hill.

Q Could you tell his Honor if the Pine Hill price were increased as noted hereon, how much would that result in an increase in your cost of producing a yard of concrete?

A If they increased the price of Number 1 and 2 grit about, - I think it would increase our cost approximately better than fifty cents, fifty, fifty-five cents.

Q A yard?

A A yard.

Q Now, in this period of time, and you have heard Mr.

Fuzak say this and his Honor also observed it, that there has been very substantial inflation.

A. Yes.

Q. And very substantial price increases?

A. Yes.

Q. And have you experienced substantial price increases even as Mr. Fuzak says, double digit inflation, in the recent past?

A. Yes.

Q. Could you give his Honor an example of this? For example, is cement the other major component?

A. Cement is a major component and that has increased since the 1st of the year twenty-eight per cent.

Q. Well, could you tell us what a yard of this $22 concrete, how much more money it costs to produce this because the cement increases?

A. I would have to compute that. I don't have the figure.

Q. I think you have it in your affidavit. Would you mind looking there and checking that?

THE COURT: If it is in the affidavit, I will see it.

BY MR. WEISS:

Q. Yes. Let us say there has been an increase as set forth in your affidavit and are you familiar with that

statement in your affidavit?

A. Yes, I am.

Q. Did you compute those figures and are they correct to the best of your knowledge?

A. Yes, but I can't remember just what they are.

Q. All right. In addition to that, have there been labor increases which both Pine Hill and Frey have experienced in the past year or two?

A. Yes, there has been increases.

Q. Are you in the same union they are?

A. Yes, the same union.

Q. Same contract?

A. Yes.

Q. Could you give His Honor an idea, if you can remember what the labor increases have been?

A. I would have to go back and check it. I can't give you the - -

Q. Are they in your affidavit?

A. I believe they are.

Q. Those were accurately prepared by you?

A. Yes.

Q. Have there been other increases, as Mr. Fuzak and his Honor have observed in all the other components?

A. Yes.

Q. Can you tell us about how much more money this has raised

the cost of producing a yard of concrete, which we have been talking about?

A. I can't give you the exact figures. I would have to go back to the office and bring them back. I have them in the office, but the price of gas has gone up. The price of diesel oil has gone up. Everything has gone up.

Q. Very substantial increases?

A. Yes, definitely.

Q. And you agree with all of that?

A. I do.

Q. Since this April 1, 1974 increase, which you noted to your customers, have you experienced increases in costs since, and leaving aside the Pine Hill application, but have you experienced increased cost since April 1, '74?

A. Yes, we have.

Q. What costs have increased since then?

A. Well, our costs of all repairs have gone up considerably.

Q. Was there a labor increase since then?

A. Our labor increase was the first of June, I believe.

Q. Was there a cement increase since April 1?

A. Yes, and that cement increase we absorbed.

Q. Now, in the nature of things, would that indicate a further increase in price after April 1, '74?

A. Yes.

Q. Could you tell us why you haven't done this?

A. If we would increase our cost of, - our price, rather, I beg your pardon, of ready-mix concrete to our customers more, I know we would have no customers.

Q. Are you operating at a profit or a loss now?

A. We are operating at a loss, a severe one.

Q. Do you have an estimate of your loss for this year?

A. Yes.

Q. What is it, please?

A. So far, it is $150,000.

MR. FUZAK: Your Honor, excuse me, but I move to strike that testimony as having no relevance to this matter, what their loss or profit might be. I don't think that has any bearing on it.

THE COURT: I will not consider it on this hearing.

MR. FUZAK: Thank you, sir.

BY MR. WEISS:

Q. I notice that in the price increase which Frey or Pine Hill sent, - asked you to pay for grit in 1968, they asked you to pay almost a fifty per cent increase in the price of grit, whereas there was only a five per

cent increase in the price of gravel. Assuming that grit and gravel are produced 50/50 or 60/40 out of the same batch, can you give me any reason why it would cost more to produce that grit than gravel in 1968?

MR. FUZAK: I object to that, your Honor.

BY MR. WEISS:

Q I will rephrase it then. Is it logical, assuming that grit and gravel come out 60/40, do you know of any logical reason why the price increase for grit and gravel should not be on a linear basis; that is approximately the same percentage for grit and gravel?

MR. FUZAK: I object to that as well, your Honor. This woman is not qualified to testify as to the operations of any company ostensibly except her own.

THE COURT: I doubt because of the prior answers that Mrs. Muck has given, I doubt whether she is, but I will permit her to explain if she can.

THE WITNESS: Would you rephrase the question, so I get it straight?

BY MR. WEISS:

Q In 1968, the price increase was about a fifty per cent

increase for grit from two twenty to three twenty a ton but only ten cents or about a five per cent increase in gravel. Do you know of any logical reason because of manufacturing costs, why it would be a non-linear increase?

MR. FUZAK: Same objection, your Honor.

THE COURT: Strike out "manufacturing costs". In other words, there was an increase in grit, but there was a smaller increase in gravel.

THE WITNESS: That's right. He shouldn't disqualify me in pricing of gravel because we do have a gravel business.

THE COURT: I know.

THE WITNESS: So I am aware of the costs.

THE COURT: I suppose that happens to you too. Some years you increase your gravel price list and your grit price?

THE WITNESS: There may be a difference, possibly, like five cents or so, but there would be no market difference like they have presented to us.

MR. WEISS: May I address your Honor only to this extent, and I'm not offering evidence. The purpose of this question, your Honor,

is to show that in 1968 it is our contention that since grit was a necessary component of every type requirement and there was no other source of grit in this county, that it was a predatory attempt to drive - -

MR. FUZAK: I object.

THE COURT: For our purposes here, Mrs. Muck, I will accept her testimony as to the fact she can see no reason why there should be a substantial increase in the difference in price between grit and gravel.

BY MR. WEISS:

Q Now, I call your attention to the reverse of this situation in 1974, Mrs. Muck, and here Pine Hill proposes no increase in the price of grit, but a substantial increase in the price of gravel. Do you know of any logical explanation of that?

A My only logical explanation of that would be that we were Pine Hill's largest purchaser of grit and gravel and I think they designed their prices for our benefit.

MR. FUZAK: I move to strike that, your Honor. That is entirely improper.

MR. WEISS: I ask your Honor on this point - -

THE COURT: I will sustain the objection. Strike it.

MR. WEISS: Exception, please. In this connection, your Honor, I call your attention to the affidavit of Mr. Moran and I would like this made a record now - -

THE COURT: All the affidavits are part of the record.

MR. WEISS: May I just make this point, your Honor. Mr. Moran states the purpose of this application is to cause Frey to buy grit from Pine Hill and that is the purpose of the price increase and so I, therefore, state to you that this price application is not in good faith, - this is our contention here, but it is an economic gesture not motivated by price increases but he clearly states in his affidavit he wants us to buy his grit and we are his largest customer and he can't sell it to anyone else and he is trying to force us to buy it by this price increase on gravel.

THE COURT: I am not going to listen to argument now, Mr. Weiss, and I am not going to

consider that. You just finish the testimony. That is all I want today. We cannot have the argument in bits and pieces. Are there any further questions you have of Mrs. Muck?

MR. WEISS: Yes, your Honor. May I have a moment, please?

THE COURT: Why don't we do this so you can get your papers together there if you desire, We will take a break.

(Recess taken at 11:10 a.m.)

* * * * * * * * * *

PROCEEDINGS: After recess, 11:35 a.m.

APPEARANCES: As before noted.

L O I S M U C K, a witness called by and in behalf of the plaintiffs, having been previously duly sworn, resumed the witness stand and testified further as follows:

DIRECT EXAMINATION BY MR. WEISS (Resumed):

THE COURT: Before I forget, Mr. Weiss and Mr. Fuzak, here are copies of an order which I filed today referring this deposition and discovery to the Magistrate.

MR. FUZAK: Thank you, your Honor.

MR. WEISS: Thank you, your Honor. May I take a moment to read it?

THE COURT: I don't think it is important to this hearing.

MR. WEISS: Your Honor, I stated that we wanted to use certain admissions. I would like to now offer the admissions made or the statements made in the reply, in the affidavit of Mr. Jones submitted to your Honor, sworn to September 6th, 1974, in Paragraph 5 and Paragraph 9. I won't read them to your Honor because you have

them, and Mr. Moran's reply affidavit sworn to the same date, September 6, '74, Paragraph 14. It is our contention that these statements show that the application is based on an attempt to sell grit and not because of increased prices and stipulates we are their largest customer.

THE COURT: Anything else?

BY MR. WEISS:

Q Yes, your Honor. Mrs. Muck, could you state to us the location of the washing plant, gravel plant, gravel processing plant that was utilized for supplying you up until recently?

A Well - -

Q From 1949 on.

A That plant, washing plant, is located on the corner of Peppermint Road and Pavement Road in Lancaster, the same place that our batching plant is located.

Q Are they right next to each other?

A Yes, they are.

Q On the same piece of property?

A Yes.

Q And did you, at one time, own that washing plant, that sand and gravel plant?

A. Yes, we did.

Q. Is that the plant that you sold to Pfohl?

A. Yes, it is.

Q. And that is the time you entered into this agreement?

A. Yes, it is.

Q. And did Pfohl continue to use this plant to supply you?

A. Yes. Pfohl used this plant to supply us by our selling this property to Pfohl and the plant they were to keep our bins full at all times and we were to keep our batching plant there and guarantee them being a customer.

Q. All right. Now, did there come a time when this plant needed modifications or improvements?

A. As Pfohl went along, he was modifying as he progressed along.

Q. In or about 1957, did Mr. Pfohl purchase some Eagle Equipment to modify this plant?

A. Yes.

MR. FUZAK: If your Honor please, I object to this line of questioning on the ground it has no conceivable relevance to the issues that are before the Court in this hearing today. There is no requirement anywhere in that contract or otherwise that we maintain or keep this plant in operation or do anything else with it, and I think this is just a

complete aside.

THE COURT: Mr. Weiss.

MR. WEISS: Yes, your Honor. This is not directed to the lawsuit. It is preliminary. What I am trying to show here is that the plant when it was purchased by Pine Hill, they did not install this equipment which was on the premises, but instead, sold it off and the plant then became incapable of producing grit and then they had to, - they then started supplying inferior grit which was the reason why they did not purchase the grit from Pine Hill.

THE COURT: I will sustain that. That will certainly get us into many other issues and I will sustain the objection.

MR. WEISS: All right. Again, exception, your Honor.

THE COURT: All right.

BY MR. WEISS:

Q In any event, Mrs. Frey, in 1968, which is the last year you were purchasing grit and gravel from Pine Hill, was that grit and gravel being produced at your former plant on Pavement and Peppermint Road?

A. Yes, it was.

MR. FUZAK: I am sorry. I object to the form of the question, your Honor, because I don't think that is proof. I think there were purchases of grit and gravel after 1968. I think that is clear from the papers on file here.

MR. WEISS: I am not trying to mislead anyone here.

THE COURT: Ask the question.

BY MR. WEISS:

Q. I will rephrase it, your Honor. In 1968, were you purchasing your grit and gravel aside from special requirements at the Lancaster Plant from your former plant owned by Pine Hill at Pavement and Peppermint Roads?

A. Yes.

Q. In 1969, you did not and in 1970, you did not; is that right?

A. That's right.

Q. And under the Court order in June of 1971, you commenced again to purchase all your grit and gravel from Pine Hill?

A. Right.

Q Now, from what location did Pine Hill supply you starting in June, 1971?

A They were working - -

Q I don't mean gravel. I mean which plant, which washing plant?

A Well, they supplied us from the Peppermint Road plant from our original plant.

Q All right. Now, was the grit - -

THE COURT: Mr. Weiss, there is no order of the Court requiring your client to purchase, right?

MR. WEISS: I think that is true, your Honor. I would like to review the order again, but I think that is true, but your Honor, our client - -

THE COURT: If you do not want to buy, I will just stop the hearing right now and we will have no order at all.

MR. FUZAK: We would stipulate to that result, your Honor. We will take it.

THE COURT: I am just puzzled by the approach here. As I recall, this was done because I felt there was lack of movement because Mr. McDonough had a lot of other things and I thought to get it going this might

be a little sanction, but I never directed, it was certainly not the intent to have anybody think that I was ordering them to purchase.

MR. WEISS: If your Honor will listen, I will explain this to your Honor.

THE COURT: I will listen to argument, but I want to have now, please, if there is any relevant testimony Mrs. Muck can give us.

MR. WEISS: I consider this to be relevant, your Honor.

THE COURT: All right.

BY MR. WEISS:

Q Starting in June 1971, you were producing the grit which was produced at this plant?

A Right.

Q Now, can you tell his Honor how far this grit had to be trucked over the road to get from the washing plant to the batching plant?

A The truck never had to go on the road in a sense.

Q Did it have to go any further than it had to go when Pfohl was supplying you?

A No further.

Q In fact, both of these places on the same premises are

all owned by Pine Hill, your batching plant and the washing plant?

A. Right.

Q. Just an internal operation?

A. Right.

Q. If it wasn't trucked to your bin, where would Pine Hill truck it to?

A. Well, Pine Hill would have to truck it up, probably, around behind our plant and dump it over the bank and reload it.

MR. FUZAK: If your Honor please, I move to strike what Pine Hill would probably have to do and maybe have to do and so on.

THE COURT: I will sustain it.

BY MR. WEISS:

Q. Well, would you explain to his Honor, Mrs. Muck, if the plant at Peppermint Road and Pavement Road was not being utilized by you for purchase of material, could Pine Hill continue, - would Pine Hill have to truck the material to some location, and state why? Can you let it pile it up under the plant?

A. No. They would have to move it because it would become a pretty large pile, but in the original contract, the reason for them to supply us was because they took the

materials from their plant and put it into our bin. Thus, they didn't have to stockpile the material and reload it. That's why there was no trucking charge because they did not have to reload it or truck it any distance.

MR. FUZAK: If your Honor please, I move to strike that testimony. This witness is apparently attempting to interpret for the Court a contract which is the very subject matter of this action in the first place, and in the second place, this whole matter was considered by the Court in 1971 when the Court provided for trucking charges.

THE COURT: That is correct, Mr. Weiss.

MR. WEISS: It is our position, your Honor, that many times black and white, - we are not happy, and we had alternative suggestions, as Mr. Fuzak mentioned, and your Honor selected one which we were not in agreement with, but it enabled us to survive until today with many losses and we would have preferred a different one, but it was an interim order. The result would depend upon what the result would be, but we were never in agreement that this was a good

order. However bad, we considered your Honor's order to be in 1971, it was better than the more horrible alternative of having to go to Franklinville to truck it here, so that clearly puts your Honor's order in the context of how we see it. We never wanted to buy from Franklinville. If we could buy adequate materials here at the contract price that would be the best way we could compete with Pine Hill without the trucking charge and at the price the contract provided. Your order hurt us a great deal.

MR. FUZAK: I can echo those sentiments, that the order hurt us a great deal and I would suggest to Mr. Weiss and to the Court that if - -

THE COURT: Evidently, it didn't hurt either side enough. All right. Go ahead, Mr. Weiss.

MR. WEISS: What this is directed to, your Honor, is the seventy cents in your order. We didn't appeal it, but it hurt us terribly and it means another seventy cents we have to tack on to our concrete price that they don't need to pay.

THE COURT: They say ninety cents.

MR. WEISS: Pardon me?

THE COURT: Ninety.

MR. WEISS: Ninety, but that is per yard.

THE COURT: We are not going to try the contract. If ninety cents is a fair price now for a trucking charge for this material, then that is what it is going to be. We are not going to try the contract here.

MR. WEISS: Your Honor, first we say your first order was inequitable and erroneous.

THE COURT: I am not going to try this lawsuit. You may have a few more minutes, Mr. Weiss, but I am going to cut this hearing off and I am telling you that what we are going to go on is we have an affidavit here explaining what the fair trucking charge is and that is what I am going to consider.

MR. WEISS: Well, our present proof.

THE COURT: There is no obligation for you to buy, and I may dissolve the order altogether. There was no order before we had the deposition problem and it seems to me that it was an interim order, it was to give an opportunity for depositions to go

forward. I am seriously considering vacating it altogether.

MR. WFISS: Your Honor, the order, I submit, if you would consider this, the order was meant, - I think your Honor intended to preserve the status quo and enable us to survive. The order has not proved so. The company, as you can see, is losing a great deal of money. If it does not survive, it will have a lawsuit, but it will not be in business and Pine Hill will then have a substantial monopoly in this area. Now, I can - -

THE COURT: Mr. Weiss, I keep saying I am not going to say it again, but this case is here since 1970.

MR. WEISS: All right. We have made three motions, your Honor, to depose them and move the thing and we haven't got an order allowing us to do that. Now, your Honor has now given this to the Magistrate and maybe we can now get some action. If I had the proof, I could come in here and make short work of their application today.

THE COURT: All right.

MR. WEISS: This is a cross-motion today to let us proceed.

THE COURT: Mrs. Muck is here. If you want to ask her some further questions, ask her questions, but I am not going to try this lawsuit.

MR. WEISS: I understand that, but I would like your Honor to understand that we consider that no trucking charge should be applied here, not seventy, not ninety and not ten, even if there were no contract, it shouldn't be because they are supplying us, they just reach over and dump it.

THE COURT: All right. Ask questions, please, Mr. Weiss.

BY MR. WEISS:

Q All right. We have you on the same premises?

A Yes.

Q They were supplying you grit under his Honor's order and were they doing it in the same way that Pfohl was, taking it from this plant and putting it right next door?

A Yes, they were.

Q Now, when Pine Hill supplies itself grit and gravel,

does it have to go onto the road and travel a very much more substantial distance than when you get it?

A. Yes.

Q. What is the difference in miles between going, if you can, - how many feet is it from the washing plant on your property to your bins?

A. I couldn't give you in feet, Mr. Weiss. It is probably, - well - -

Q. Is it about a city block, a half a block or two blocks?

A. Maybe about two blocks.

Q. Now, how far is it from where Pine Hill washes its gravel to where its plant is?

A. I don't really know. I would be guessing if I gave you in miles, but it would be several miles.

MR. FUZAK: Excuse me, Mrs. Muck. If the witness doesn't know, I object.

THE COURT: I will sustain the objection to further questioning about that.

BY MR. WEISS:

Q. Is the distance measured in blocks or miles for Pine Hill?

A. It would be measured in miles.

Q. And does it require over-the-road travel by trucks?

A. Yes, it does.

Q Now, would it, - in your opinion, would it be more expensive for Pine Hill to take the grit and gravel from its washing plant at Peppermint and Pavement Road and put it in your bins or to sell it to another customer as far as trucking is concerned?

MR. FUZAK: I object to that, your Honor. How can this witness testify as to what would be more expensive to Pine Hill.

THE COURT: I think it is a matter of argument, isn't it, Mr. Weiss? I will sustain the objection.

BY MR. WEISS:

Q Now, Mrs. Muck, this trucking charge, have you been paying this or is it being held in escrow?

A Yes, it is being held in escrow.

Q In your opinion, are you able to pay the seventy cents trucking expense or even twenty cents additional trucking expense requested and still compete with Pine Hill?

MR. FUZAK: I object to that, your Honor, as calling for a conclusion which is possibly one of the issues in this lawsuit.

THE COURT: Sustain the objection.

BY MR. WEISS:

Q Mrs. Muck, in the affidavit submitted by Pine Hill, there is a statement that they had increased the trucking expense to their customers because of the use of independent truckers. Could you tell us if independent truckers are used to truck the material from their washing plant on Peppermint Road, Pavement Road to your bins?

A The man who supplies, who trucks our material is one of their own employees. They bring a load of washed materials an put it in our bin, cross the street, load it up with bank run, drive it back to their Pavement Road plant.

Q So they don't even deadhead back?

A No. they don't.

Q And this is their truck and their own driver?

A Yes.

MR. FUZAK: Excuse me, your Honor. I move to strike that testimony. I don't know what she means by "their truck". "One of their employees", she says. I would like to have her specify what she means by that.

THE WITNESS: Pine Hill's

THE COURT: Do you mean the source of her in-

formation? The reason I say that, Mr. Fuzak and Mr. Weiss is that Mrs. Muck is evidently very knowledgeable about some aspects of the business and she is very candid and frank about saying that she is not familiar with other aspects of the business. Perhaps the information she has about Pine Hill is correct, about how they operate with their truck and their driver and maybe it is not. I don't know. Where did you get the information?

THE WITNESS: I see the man doing this daily.

THE COURT: Do you know the terms of his employment?

THE WITNESS: He is Pine Hill's man, Mr. Harrel.

THE COURT: How do you know? Is he on the payroll, do you know?

THE WITNESS: This I don't know.

THE COURT: Strike the answer.

BY MR. WEISS:

Q Do you know him by name?

A Mr. Harrel.

THE COURT: Strike the testimony. Excuse me, Mr. Weiss, the testimony is stricken. We

will go on to something else.

BY MR. WEISS:

Q Does Pine Hill hire independent truckers, to your knowledge?

A Yes.

Q Do you know the names of any of these, - is it an independent trucking company?

A I don't know how they do it. It is their books.

THE COURT: Mrs. Muck, I am not going to listen to her testimony about the internal affairs of the Pine Hill Company. She is not familiar with many aspects of the operation of her own business and it seems to me that she would definitely be not qualified to testify about the internal operation and affairs of a competitor.

BY MR. WEISS:

Q Mrs. Muck, has this same gentleman been the man who is always delivering this material?

THE COURT: I have sustained the objection, Mr. Weiss. I am not going to listen to that testimony. If you want to ask questions, ask them in a different area.

BY MR. WEISS:

Q Mrs. Muck, has Pine Hill, including Mr. Moran, the general manager, or the comptroller, been at the Frey Company and reviewed the books of the costs of your materials and your sales and all of the other accounting records.

MR. FUZAK: I object to that, your Honor, as having no relevance to this question before us here this morning.

THE COURT: I can see no relevancy. Sustained.

MR. WEISS: Your Honor, the purpose of this is to state that these gentlemen know the costs and competitive weaknesses and position of this company and - -

THE COURT: It has no relevancy to this particular application.

MR. WEISS: I ask your Honor, in making your decision here, to consider this is an antitrust action and we,are at the present time, suffering - -

THE COURT: This application is not made at all upon that theory.

MR. WEISS: Well, your Honor, it is defended on that theory then.

THE COURT: I sustain the objection.

MR. WEISS: Pardon me?

THE COURT: I sustain the objection to questioning about it.

BY MR. WEISS:

Q Mrs. Muck, his Honor asked the question about whether or not you still desire to purchase or whether we consider this order requiring us to purchase gravel from Pine Hill. Is it your desire, wish, and wish to purchase gravel from Pine Hill under the terms provided in the contract?

A Yes, we would like to buy from Pine Hill.

MR. FUZAK: I object to the question because it calls for a conclusion of what the contract calls for.

MR. WEISS: All right. That is all I have.

THE COURT: Mr. Fuzak.

CROSS EXAMINATION BY MR. FUZAK:

Q Mrs. Muck, am I correct that you are a stockholder in both George C. Frey Ready-Mixed Concrete, Inc., and George C. Frey Batching Plant, Inc.?

A Sir, we are merged and we are now Frey Concrete, Incorporated.

Q I see. Are you a stockholder in that company?

A. Yes, I am.
Q. How many stockholders are there?
A. Just a minute. I have to count.
Q. Well, are there several, five, six, something like that?
A. Yes. There is more than five.
Q. All right, and you have what percentage of ownership?
A. I would have to go back and compute it, sir. I can't give it directly.
Q. Now, you made reference earlier to the market which you described as the market that your company is doing business in and I think you said Western New York. Do you remember that?
A. Yes.
Q. And then you defined it a little bit more than that and you said that the market that you are talking about here, that you operate, is the Buffalo area which means the City of Buffalo and the towns immediately surrounding it, the first and second ring of towns, is that a fair summation?
A. Yes. We go further than that.
Q. Basically, within Erie and Niagara Counties?
A. We go into Genesee County occasionally too.
Q. Do you go into any other counties?
A. There are always exceptions to the rule and we have been in other counties.

Q. Within this area?

A. Within this area.

Q. Now, let's talk about the grit very briefly. You, Frey Concrete maintains premises out in West Seneca for the production of gravel and grit, does it not?

A. No, sir.

Q. What are the West Seneca premises?

A. It is a ready-mix concrete batching plant.

Q. You have some premises somewhere where you have gravel deposits, do you not, Alexander?

A. Yes, in Alexander.

Q. Now, you indicated that you know something about grit and what it takes to make it and so on, is that right?

A. Yes.

Q. You would agree, would you not, that in order to process the grit to a point where it is usable, that it takes more steps than it does to process the gravel to a point where the gravel is usable?

A. Repeat, please.

Q. Well, let me rephrase it. It takes more processing work to produce grit than it does to produce gravel, isn't that correct?

A. I still don't comprehend exactly what you mean by that.

Q. Well, would you describe to the Court then, what has to be done in terms of the production of gravel for sale?

A. This is a lengthy description. You would, first of all, excavate it from the bin or from the bank. You would bring it to your hoppers, put it in your washing plant and it would go through various different tanks for its wash and it is segregated out into separate piles.

Q. And then what is left after you get through doing that, what is the residue material?

A. That is called silt.

Q. And that is not grit?

A. No, sir.

Q. All right. Now, what do you have to do to get the grit?

A. When you put it through the various washing tanks, it will separate.

Q. And you have to do another process, don't you, in order to get the grit after you have separated out the larger pieces which is the gravel?

A. Perhaps you know something that I don't know.

Q. I am asking you, Mrs. Muck, is it a fact that you have to refine that product further than gravel - -

A. When it goes through the tank, it is segregated into the different grits, types of screen size.

Q. Well, I don't want to belabor this, but are you testifying here to the Court, Mrs. Muck, that it takes the same number of operational processes to get grit as it does to get gravel?

A. Yes.

Q. Thank you. Now, you stopped buying any grit from Pine Hill in 1972 and you haven't bought any since, is that right?

A. Repeat that again.

Q. You stopped, - Frey stopped buying grit from Pine Hill in 1972 and hasn't bought any since, has it?

A. Yes.

Q. Now, for years, prior to 1969, you did buy grit from Pine Hill and you did use that grit in your ready-mix concrete, did you not?

A. Yes.

Q. And did not that grit come from the same place as the grit that was being offered to you in 1972 and thereafter, the Peppermint Road premises?

A. Repeat.

Q. Did the grit that you bought prior to 1969 and used in those years prior to 1969 come from the same places as you were being offered grit by Pine Hill in 1972?

A. It came out of the same plant.

Q. It was the same source of supply, was it not?

A. I didn't know what the source of supply was.

Q. You don't know that that grit was from the same stockpiles and piles that were on the Peppermint Road premises?

A. It came from what stockpiles you had there, but where that stockpile come from, I really wouldn't know.

Q. Are you testifying, Mrs. Muck, that you don't know that the stockpiles of grit that are on the Peppermint Road premises came from the Peppermint Road premises?

A. There was a stockpile in that pit.

THE COURT: All right.

BY MR. FUZAK:

Q. Would you agree with your knowledge of this industry that if you were producing gravel and, of course, along with it grit and if you were not able to sell the grit, that it, therefore, would cost you more in effect to produce the gravel?

MR. WEISS: I object to the question if your Honor please.

THE COURT: I will overrule that.

THE WITNESS: I wish he would restate that. He is giving me several questions and I don't know whether he wants each one answered or not.

THE COURT: This is to the point that you did not buy grit from Pine Hill, you only bought gravel, right?

THE WITNESS: Yes.

THE COURT: Ask the question, Mr. Fuzak.

BY MR. FUZAK:

Q Now, will you agree,with your experience in this field, that if a company was required or forced to produce only gravel and was unable to sell the grit that that, in effect, would cause an increase in the cost of the production of the gravel?

MR. WEISS: I object to the question, your Honor. This is the type of thing that I couldn't ask her.

THE COURT: No, it is not. She either knows or she does not know. Do you know?

THE WITNESS: If he produces grit?

THE COURT: If he produces grit but cannot sell the grit and produces gravel and must sell the gravel, having the stockpile of grit, will that increase the cost of the gravel?

THE WITNESS: Well, I don't understand what - -

THE COURT: We will go on to something else.

BY MR. FUZAK:

Q Thank you. Is it correct, Mrs. Muck, that Frey Concrete bought more than 28,000 tons of grit from Pine Hill in 1971 and that grit came from the Peppermint Road premises?

A. I am not sure of the times, but we did buy from the Peppermint Road premises.

Q. And you used that grit in your ready-mix concrete?

A. Yes.

Q. And you sold that ready-mix concrete?

A. We had a lot of trouble with the grit.

Q. In 1971, are you saying?

A. When we stopped buying from you, we had trouble with the grit.

Q. No, I am saying in 1971.

A. In '71, yes, we used your grit.

Q. Thank you. Now, do I understand properly from your previous testimony that there are other aggregates that can be used for the production of ready-mix concrete than gravel?

A. That's what I said.

Q. All right. Would you tell the Court what those other aggregates or components are?

A. They are crushed stone.

Q. In other words, you can use crushed stone for the manufacture of ready-mix concrete in place of gravel and that is done?

A. If the customer calls and asks for gravel, we deliver gravel. If the customer calls and asks for crushed stone, we deliver crushed stone. It is a matter as to

what the customer asks us to deliver.

Q. But crushed stone can be used for the production of ready-mix concrete and is used, is that right?

A. In certain circumstances, yes.

Q. You made reference also to other things that can be used in place of gravel. Will you tell us about those?

A. Well, you can use in specialized work, the lightweight aggregates, but that is very special. I mean that you would have to have a specific order for.

THE COURT: Slag?

THE WITNESS: You can use slag, but that again has to be specified by the customer.

BY MR. FUZAK:

Q. When you talk about lightweight, what are you talking about?

A. I am talking about haydite.

Q. What is haydite?

A. It is a shale that has been put through a kiln and has been heated and exploded to some extent and it makes it light in weight.

Q. Mrs. Muck, am I correct that you agree that there have been increases in cost of operation both with respect to the production of concrete, sand and gravel, and also with respect to the production of ready-mix concrete

since 1971?

A. There has been increases in the ready-mix concrete, yes.

Q. In the cost components, I am talking about, such things as electricity and the wages of the people who have to work on these materials and diesel fuel and that type of thing, there have been material increases, have there not?

A. I have testified to that.

Q. You have experienced those increases in Alexander as well as in West Seneca, have you not?

A. Yes.

Q. Mrs. Muck, is it the fact that the operating engineers that you use, Frey uses in its operations have a rate of pay of approximately one half of that which Pine Hill has to pay its operating engineers?

A. That is not true.

Q. That is not true to your own personal knowledge?

A. Yes.

Q. What is the relationship to your personal knowledge?

A. I have a contract, - we have a contract with them and we pay somewhat less than what they do.

Q. How much?

A. But it is not fifty per cent.

Q. How much less, can you tell us?

A. I would have to get the, - Mr. Moran would know that. He went through our - -

Q. Yes, but ma'am, excuse me, I am asking you.

A. I would have to take and go back and look up dollar for dollar. I can't tell you. I can tell you what you are paying because I took the time to look that up.

Q. At any rate, Mrs. Muck, it is a fact the wages being paid by Frey Concrete for their operating engineers are lower than those which have been paid by - -

A. Not Frey Concrete; we pay the same prices as Pine Hill.

Q. As to what?

A. Frey Concrete pay the same engineers' prices and the same truckdrivers' prices.

Q. Well, Mrs. Muck, a minute ago I thought you said there was a difference.

A. But you are talking about another company.

Q. What other company is that?

A. Our Frey Sand & Gravel Corporation.

Q. Oh, I see. What is the Frey Sand & Gravel Corporation?

A. You spoke to me before about that. That is our operation in Alexander.

Q. And that is the company that is engaged in the production of sand and gravel for ready-mix concrete?

A. That's right.

THE COURT: That is in a different area and,

therefore, you have a different contract with the union?

THE WITNESS: That is right.

THE COURT: All right.

BY MR. FUZAK:

Q Mrs. Muck, you are aware, are you not, that Pine Hill sells gravel to something in excess of a hundred customers other than Frey Concrete, aren't you?

A Well - -

MR. WEISS: Your Honor, Mr. Fuzak objected to me asking her about Pine Hill.

THE COURT: I will sustain it.

BY MR. FUZAK:

Q Mrs. Muck, you, I take it, because of your position, are familiar and have been familiar with the various prices for product that have been charged to you over the years by Pine Hill, is that fair to say?

A Yes.

Q All right, and I take it you would then recall the fact that in 1958 the price for concrete grit or concrete sand, the list price, the pit price of Pine Hill was $2.20; do you remember that?

A I don't remember. You are refreshing my memory, I think.

Q. Does that sound right to you?

A. I would say probably.

Q. And you are aware, are you not, that there were no price increases in grit over a full ten-year period from 1958 to 1968?

A. Yes, because back there at that time, the price was inflated.

Q. Regardless of whatever your conclusiary reasons are, the fact is, is it not, that there were no price increases by Pine Hill to you for grit between 1948 and 1958?

A. Not 1948.

Q. 1958 to 1968. I misspoke.

A. Yes.

Q. Now, today the current price on the price list for April 1, 1974 for concrete grit is $3.50, you are aware of that, of course?

A. That is your pit price.

Q. Now, in 1958, I take it you are aware also that the pit price for five eighths inch or Number 1 gravel was $2.40.

A. I don't have those figures in front of me. I have to assume that you are right.

Q. Well, can you assume that or does this refresh your recollection?

MR. WEISS: Your Honor - -

THE COURT: Is this on the sheet here?

THE WITNESS: No, sir.

MR. FUZAK: The sheet goes back conveniently just a certain period of time, your Honor.

THE COURT: We are not going back to 1958. Does this have any bearing, Mr. Fuzak?

MR. FUZAK: This deals, very quickly, with the questions of non-linear increases and so on over the period of time we are talking about here from '58 to '74. The fact is that there have not been non-linear increases. The increases have been rather similar over the total period of time. As a matter of fact, the sand increase over that period of time amounts to fifty-nine per cent and for the gravel is between forty-six and forty-eight per cent, that's all.

THE COURT: Isn't it true, Mrs. Muck, that the answer as far as the differing increases in the prices of grit and gravel, is it for certain purposes people need more gravel at certain times and at other times they need less gravel; other times they may

need more grit, isn't that true?
For example, if you had a lot of customers who ordered crushed stone or slag or haydite, then they would not be using the gravel, is that right?

THE WITNESS: That's right.

THE COURT: On the other hand, if you had a lot of people come in and say "Well, we want crushed stone or that other material or we want gravel", then there would be a greater demand, right?

THE WITNESS: True.

THE COURT: And that may be one of the factors, right?

THE WITNESS: Yes.

MR. FUZAK: Thank you, your Honor. No further questions.

MR. WEISS: Your Honor, a few more questions, but first, since Mr. Fuzak has had no questions on this, I now offer Exhibit 1 in evidence subject to your Honor's ruling on the adjusted, - elimination of that adjusted Buffalo price.

MR. FUZAK: I object to the introduction of the exhibit, your Honor, on the ground that

it patently has no basis for consideration here. We are talking, apparently, about different markets, different circumstances and - -

THE COURT: I will consider it in evidence. Mark it in evidence and as far as the argument about relevancy and materiality, we will consider that.

(Plaintiffs' Exhibit Number 1 received in evidence.)

THE COURT: Mr. Weiss, do you have any further evidence?

REDIRECT EXAMINATION BY MR. WEISS:

Q I just have a few. His Honor asked about the different demand for grit and gravel. With whatever aggregate you use for the large aggregate, the small aggregate is always grit, is that correct?

A That's right.

Q If you use haydite, you still use grit?

A Right.

Q And grit, for his Honor's elucidation, is small, very small pieces of gravel, is that right?

A. That's right, sandlike.

Q. A quarter inch or smaller, is that it?

A. Quarter inch down.

Q. It is also called concrete sand?

A. Right.

Q. Are there many customers of different types use gravel? Is gravel used as base courses under things or for firming up things? Do people, besides concrete makers, use gravel?

A. Yes.

Q. Do people, besides concrete makers, use grit?

A. Yes.

Q. All right. Now, who else uses grit besides concrete makers?

A. Well - -

Q. Or is concrete makers the major users of grit?

A. I would say probably most of the grit would go into concrete.

Q. And that is not true of gravel; most of the gravel does not necessarily go into concrete making?

A. That's right.

Q. But most of the grit does go to the concrete makers?

A. That's right. Mr. Weiss, would you rephrase that last one. I didn't understand what you said.

Q. I think your testimony was that most of the grit was

used by concrete makers, but there are other people who use gravel. His Honor was asking about the demand for grit and gravel. Is it true that grit is primarily used by concrete manufacturers?

A. Yes.

Q. And gravel is used by other people in addition?

A. Yes.

Q. Talking about the difference of demand for grit.

A. But grit is in demand for other people too.

Q. If there is a change in price of grit, does that necessarily affect all concrete makers who buy the grit?

A. Yes, it does.

Q. Does that necessarily affect other people besides concrete makers if there was a grit increase?

A. It would affect others too.

Q. But if thereis a concrete increase that affects everybody who uses gravel, which is most classes of - -

MR. FUZAK: I object to the form of the question.

BY MR. WEISS:

Q. Strike it out. The gravel price increase affects more people than the grit price increase, is that correct?

MR. FUZAK: I object to that question also.

BY MR. WEISS:

Q Maybe it was leading. Which affects more classes of people, a gravel price increase or a grit price increase?

MR. FUZAK: I object to that question, if your Honor please, on the ground that I don't believe there is any showing that this witness has any competence to testify to that.

THE COURT: I will sustain the objection.

BY MR. WEISS:

Q Do you know if grit is used by more people or gravel is used by more people?

A Possibly gravel would be used by more people.

Q With regard to grit, when you purchased grit from Pine Hill during 1971 and during part of 1972, was it one of the complaints with grit have to do with water or water soaking, I think you mentioned before?

A Yes.

Q Now, how did that affect you, adversely? I think you said it would bridge over in your bins. What did you mean by that?

A Well, when we put it in the bins, or when the driver would put it in the bins, it would just sit there and then some of it would drop out of the bins. It was

difficult to load it and besides that, we had to pay extra for the water.

Q. Did you make a computation of how much the water in the grit cost you besides an increase in price?

A. It would cost us about five - -

MR. FUZAK: Excuse me. I object to that, your Honor, some computation not before the Court.

THE COURT: I will sustain the objection.

BY MR. WEISS:

Q. Do you have this in your affidavit, Mrs. Muck?

A. Yes.

Q. And did you make a computation to arrive at that?

A. I have facts to arrive at that.

Q. And are they in your affidavit?

A. Yes.

Q. In effect, does all grit have some moisture in it?

A. Yes, there is some moisture in grit.

Q. What is the normal percentage?

A. Between four and five per cent.

Q. Did you make tests or have tests made on the gravel or the grit you were buying from Pine Hill to determine the moisture percentage?

MR. FUZAK: If your Honor please, I move to

strike out this testimony. I don't think this witness is qualified as an expert to testify as to what is normal and what is not. I don't think it is proper to ask her if some tests not before the Court were made and then elicit the conclusions from those tests.

THE COURT: I will sustain the objection. It seems to me, Mr. Weiss, that the reason for that is this, that evidently you were dissatisfied, your client was dissatisfied with the quality of the grit which was being delivered to them. My order provided that Pine Hill was to sell, but there was no obligation on the part of your client to buy. I suppose that willful delivery of bad grit could indicate bad faith, but to try that out in this proceeding, we do not have the time and I do not think that it would take, - it would take extremely complicated testimony from people who were on the scene, who made the tests and for a number of reasons, Mrs. Muck here is not the person. She may have some general knowledge, but

she would not be the person who would be making the tests or be right on the scene and for the purpose of this particular hearing, I am not going to reach that question.

MR. WEISS: Could I ask - -

THE COURT: Let me finish.

MR. WEISS: I am sorry.

THE COURT: I am not going to reach the question because if they were selling your customer bad material, you have the absolute right to do what you did and that is to go out and buy it elsewhere and that seems to me, as far as this particular hearing is concerned, the end of it. On your larger question in the trial of this lawsuit, that may be something appropriate to try out, but it is not appropriate here and I am not going to consider it.

BY MR. WEISS:

Q Your Honor, I just will ask this general question which may or may not be logical, but don't answer until Mr. Fuzak considers it and his Honor rules. Does excessive moisture in grit result in, - strike that out. Is the

grit that is sold to you weighed in the wet condition before it is delivered?

A. Yes.

MR. FUZAK: From where, may I ask, and sold by whom?

THE COURT: Sold to them?

MR. WEISS: I am trying to find out.

THE COURT: You do not buy grit.

THE WITNESS: We did buy grit.

THE COURT: I am sorry. You did buy grit.

THE WITNESS: Yes.

BY MR. WEISS:

Q. When you bought the grit, was it weighed by Pine Hill and sold to you by weight but with this moisture in it, whatever the amount was?

A. Yes.

Q. So you were in effect paying for moisture, whatever amount was in there.

A. Yes.

MR. WEISS: That is all I have.

RECROSS EXAMINATION BY MR. FUZAK:

Q. That is normal, that you pay for some moisture, Mrs. Muck, in grit?

A. Not excessive moisture.

Q. But whatever the amount, there is some moisture in grit, is there not?

A. I testified to that earlier.

Q. And it is weighed in that condition?

A. No.

Q. With the moisture in it?

A. With some moisture in it, but not excess.

MR. WEISS: Does that have the effect of increasing the price?

THE WITNESS: Yes, it does.

THE COURT: Mr. Weiss, any further evidence?

MR. WEISS: Yes, Mr. Moran.

THE COURT: Is he here now?

MR. WEISS: Yes, he is.

THE COURT: How long would his testimony be?

MR. WEISS: Well, I am trying myself to limit it to what your Honor considers the issues to be in this hearing and assuming Mr. Moran has the material before him - -

THE COURT: All right. We will start with Mr. Moran and see what is needed. All right, Mr. Moran.

* * * * * * * * * * * *

N O R M A N M. M O R A N (90 Meyer Road, Amherst, New York), a witness called by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WEISS:

Q. Mr. Moran, what is your connection with Pine Hill Concrete Mix Corp., Inc., one of the defendants in this case?

A. I am comptroller.

Q. Is that an officer?

A. No.

Q. Position?

A. No, it is not.

Q. Are you an officer?

A. No, I am not.

Q. Are you a director?

A. No, I am not.

Q. Are you a shareholder?

A. No, I am not.

Q. And as comptroller, are you in charge of the financial matters of the corporation?

A. Yes.

Q. Are you also the general manager?

A. No.

Q. Who is that?

A. We don't really have a general manager per se.

Q. Would it be fair to say you are in charge of the day-to-day operations on the executive level?

A. With respect to the areas that normally come under a comptrollership, yes, which would be finances.

Q. Well, who is your superior?

A. Mr. Kahle, Ludwig Kahle.

Q. How old is Mr. Kahle?

A. He is seventy-one years old.

Q. And is he in charge of the day-to-day operations?

A. Yes.

Q. Is he there?

A. I mean he has the final say.

Q. Well, he is not a well man, is he?

A. Not very well, no, he isn't.

Q. I mean he hasn't left anyone else in charge besides you, has he?

A. Well, there are different departments in our corporation and they don't all come under the jurisdiction of one person.

Q. Well, my impression, - I could be wrong, - is that you are in charge of the day-to-day operations subject to Mr. Kahle's veto or final say, as you put it; would you say that is a fair statement?

A. I don't think that is quite correct, sir.

Q. When you say "departments", what other departments do you have and who would be in charge of those departments?

A. The Sand and Gravel Department, Mr. Robert Jones is in charge of that department.

Q. Does he report to you?

A. No, he doesn't.

Q. All right.

A. And then there is also the Sales Department and we have a sales manager.

THE COURT: What is his name?

THE WITNESS: Mr. Becker, Melvin Becker, and then, of course, I think the Accounting Department of which I am in charge of. And there is also the manufacturer of ready-mix concrete which Carl Kahle is in charge of.

BY MR. WEISS:

Q. On the mechanical level, you are not in charge of any of the manufacturing or production units?

A. No.

Q. But on the executive or administrative level, is there anyone aside from Mr. Kahle who is in charge of the executive administering of these units?

A. Well, we are not set up that way, really. For example, Mr. Carl Kahle is in charge of the ready-mix operation on Bailey Avenue. Mr. Kurt Kahle is in charge of the ready-mix operation on Transit Road.

Q. Are they officers of the corporation?

A. They are officers of the corporation.

Q. Now, what do you do on a day-to-day basis? Are you in the officer there on a day-to-day basis every day?

A. Yes, I would say so.

Q. And you are not just, - what I am trying to find out, you are not just limited to the accounting functions at Pine Hill; you make policy decisions?

A. With respect to finances and accounting, I would say yes, with respect to - -

Q. Pricing policies?

A. Operation of the ready-mix plants and sand and gravel plants, no.

Q. Pricing.

THE COURT: Mr. Weiss, what are you interested in? Are you interested in finding out whether he sets the price?

BY MR. WEISS:

Q. Yes. Do you make decisions or participate in decisions with regard to fixing the prices?

A. Sometimes.

Q. Your background is what, Mr. Moran?

A. Well, I am a Certified Public Accountant if that is what you are asking.

Q. And you are a partner in Price-Waterhouse?

A. I was a partner with Amen, Surdam and Company and they merged with Price-Waterhouse.

Q. And you went from there to Pine Hill?

A. Yes, sir.

Q. And you have generally appeared in all of this litigation, the court hearings and the depositions and the meetings?

A. I would say most of the time.

Q. Yes, all right. Now, what is the relationship between Regent Sand & Gravel Corp. and Pine Hill?

A. Regent is a wholly owned subsidiary of Pine Hill Concrete Mix Corporation.

Q. Which company produces the sand and gravel which is involved in this lawsuit?

A. I would say Pine Hill Concrete Mix Corporation.

Q. Which company owns the gravel pits and the batching plant or the washing plants?

A. You have to specify which washing plant.

Q. Well, let's take the Frey operation. Which company bought the Frey operation from Pfohl?

A. Regent Sand & Gravel.

Q. Does Regent Sand & Gravel operate that unit?

A. No, it doesn't.

Q. Does it sub-lease it?

A. Yes, it does.

Q. Is there a written document or an oral document constituting the lease?

MR. FUZAK: I object to the form of the question. I don't know what an oral document is. I don't know whether the witness does.

BY MR. WEISS:

Q. Is there a written or oral agreement involving this lease?

A. Yes, there is.

Q. And do you, perchance, have that with you today?

A. No, I don't.

Q. Does Regent lease this for a consideration from Pine Hill?

A. Yes, they do.

Q. Could you tell us what that is?

MR. FUZAK: Your Honor, I object to this line of questioning. I don't see any relevance to getting into this area of the internal operations of the company with respect to

the issue before the Court now.

THE COURT: Mr. Weiss, isn't the question now is the increase under the present economic circumstances, is that a fair one and is it, - essentially, is this the same price which is posted as far as other customers at Pine Hill?

MR. WEISS: No, your Honor. That is the question that plaintiff is proposing to the Court. That is not the question that Frey is meeting or it is not the question that is raised by Frey's reply.

THE COURT: I know that is not the question which is raised by your reply, but in order to thrash out your theory would mean that we try the lawsuit.

MR. WEISS: I don't think so, your Honor, for this reason; what we are doing here, your Honor, is an interim thing. Your Honor was prompted by the fact that it was in our complaint that we were not being allowed to progress which was in 1971. Your Honor intended to give us some relief at that time on an interim basis to abide the result. Nothing permanent, but a means of

living together in the interim. In the event that it was determined that there was no contract, we have breached the contract or fought for whatever reason we would then have to pay the full normal going price. In the event it was determined that there was a contract, we would then be entitled to get a refund of this so what we are talking about, just something to live together, and I think, and I say this very humbly and respectfully, your Honor made a very serious mistake in the June, 1971 order because you hurt us greatly with that, but we did not appeal and I think we could have appealed because that is a preliminary injunction.

THE COURT: I understand now, Mr. Weiss, that you feel I have made a mistake.

MR. WEISS: Yes.

THE COURT: Now perhaps I am going to make another mistake, but I am going to make it and the mistake is, perhaps, that I am going to say that for purposes of this hearing, the relationship between Regent and Pine Hill is not material so as far as that is

concerned, I am going to sustain the objection to asking questions about it.

MR. WEISS: All right. Exception, if your Honor please.

THE COURT: It seems to me that the question is are you selling, and I think there is some argument made here that the only customer that Pine Hill has or the most important customer of Pine Hill is your client.

MR. WEISS: Mr. Moran has stated so.

THE COURT: If that is the case, maybe some accommodation ought to be made. Maybe we will have to go into how the price is arrived at, but if not, if there are a variety of customers and these customers are free to go in the marketplace and buy from others, I don't know how far we ought to go in this hearing, so why don't you ask Mr. Moran about these facts.

MR. WEISS: These are other problems, your Honor, and this involves the antitrust effects of it, but I see what your Honor is saying and I respectfully disagree, but I will proceed as your Honor directs.

THE COURT: All right.

BY MR. WEISS:

Q Mr. Moran, does Regent Sand & Gravel, - you will see what I am doing, - has the price that Regent Sand & Gravel charges Frey or Pine Hill or the rental, has that varied or increased over the years?

MR. FUZAK: I object, if your Honor please. He is just doing what your Honor said he should not do.

MR. WEISS: I am not asking what it is; I am just asking whether there has been an increase by Pine Hill.

MR. FUZAK: It is the same thing.

THE COURT: I will sustain the objection.

BY MR. WEISS:

Q Mr. Moran, has Pine Hill's cost of producing gravel increased during the period we are discussing here?

A Yes, they have.

Q Could you tell us, Mr. Moran, what factors have caused your price of gravel to increase, your cost of producing gravel?

A Well, I would say practically every cost has increased.

Q Could you tell us what it costs you to produce a ton of Number 1 gravel, Number 2 gravel and grit at the present time?

MR. FUZAK: Well, your Honor, again - -

THE COURT: I don't know whether - -

MR. FUZAK: I object to that.

THE COURT: This wouldn't be up to Mr. Moran to answer. It would depend on how you keep your records, what kind of detail goes into your systems of accounting. I don't know. Can you answer that question, Mr. Moran?

THE WITNESS: Well, your Honor, first of all, I don't feel that divulging our cost per ton is pertinent to the question at hand and truthfully, our records are not kept on a basis that we keep our costs on a per tonnage basis.

THE COURT: Maybe the first point is a good one at this time. I think, Mr. Weiss, it is important to find out how many customers they have and about what percentage of the market is made up of your sales to Frey.

BY MR. WEISS:

Q I will cover that, your Honor, now, and come back to this thing. In your affidavit, - you made an affidavit

a reply affidavit and a second reply affidavit, is that correct?

A. I believe that is correct.

Q. In your affidavit, you stated, and if this is incorrect, - I believe that Frey is your major grit and gravel customer.

A. That's correct.

Q. Do you consider Pine Hill a customer? That is, is there a separate accounting, is that considered a separate customer or not a customer?

MR. FUZAK: Object to that, your Honor. That is the same question that your Honor ruled on before.

THE COURT: No. Is it a customer?

THE WITNESS: Yes, it is, your Honor.

THE COURT: Go ahead.

BY MR. WEISS:

Q. Can you tell us what price Pine Hill pays as a customer on your books?

THE COURT: Wait a minute. Mr. Moran, you have customers, Pine Hill, Frey. Do you have some other customers?

THE WITNESS: Yes, your Honor.

THE COURT: Can you give us some of the names,

please?

THE WITNESS: Yes. There is Anchor Concrete. There is Associated Planning & Development. I would say we have at least a hundred customers, sand and gravel.

THE COURT: All right.

BY MR. WEISS:

Q Now, who is your largest customer for grit?

MR. FUZAK: When, sir? Do you mean now, today?

BY MR. WEISS:

Q Who was your largest customer for grit in 1971 after the Judge's order?

THE WITNESS: Your Honor, you were going to say something. Is that superceded now by Mr. Weiss?

THE COURT: Thank you, Mr. Moran.

THE WITNESS: In 1971, Mr. Weiss, who was our largest customer?

BY MR. WEISS:

Q For grit.

A Besides ourselves, I would believe that Frey was.

Q All right, and this would be true in 1968 also?

A. I would say so.

Q. All right, between Pine Hill and Frey in 1968, what percentage of your grit sales were comprehended? I will rephrase it. What percentage of your grit sales in 1968 went to Pine Hill and Frey?

A. I really couldn't give you that answer. I don't know.

Q. Well, would it be over fifty per cent?

A. I would think so.

Q. Would it be over seventy per cent?

A. I don't believe so.

Q. Somewhere between fifty and seventy per cent?

A. I would say so.

MR. FUZAK: Objection.

BY MR. WEISS:

Q. What about your Number 1 grit or gravel, Number 1 gravel in 1968, what percentage of that, approximately, did Frey and Pine Hill together consume?

A. I don't know the answer to that.

Q. Would it be less than grit or more than grit?

A. I don't know the answer to that.

Q. Would it be more than fifty per cent, could you tell us that?

A. I couldn't tell you that.

THE COURT: He said that he could not tell us.

BY MR. WEISS:

Q It could be possibly less than fifty per cent, that is all I am trying to get.

MR. FUZAK: I object, your Honor. The witness can't answer and he said so.

THE COURT: Mr. Moran, can you tell us what the situation is now as far as the, - you know, look at all of your customers as far as the makeup of Pine Hill, Frey in relation to all the rest of the customers now?

THE WITNESS: I couldn't, your Honor, but I could say that Frey is a percentage of our total sales is less than forty per cent.

BY MR. WEISS:

Q And Pine Hill would be another forty per cent, approximately?

A I said Frey would be less than forty per cent. I really don't know what per cent it might be. It might be thirty or it might be twenty-five.

Q All right. Would you say that Pine Hill also would be less than forty per cent?

A I don't know.

Q But these things could be determined from your records?

A. Yes, they could.

Q. Is this correct as stated in your affidavit and I approach you and show it to you and let you read it, dated September 6, 1974, Paragraph 14, as a matter of survival, - you mean survival of Pine Hill, I suppose, it is essential that Frey Concrete be compelled to pay the same price for gravel that all other Pine Hill customers pay, is that correct?

A. Yes.

Q. All right. Now, did you include Pine Hill itself in there when you made that statement? In other words, is it your intention that Frey pay the same price of gravel as Pine Hill is paying?

MR. FUZAK: I object to that, your Honor. That doesn't have any relevance to this proceeding here if your Honor please. The problem here - -

THE COURT: Mr. Fuzak, he made a representation there in the affidavit and the question is is it your intention. I think that we are entitled to an answer so I will overrule your objection.

THE WITNESS: Do you want to rephrase that question, please.

BY MR. WEISS:

Q Would you read the first sentence? Do you have your glasses?

A I have to get my glasses.

Q Paragraph 14, Mr. Moran, the first sentence states, "As a matter of fact, survival", just the first sentence. When you have that in mind, I will ask a question.

A All right.

Q Is it your intention having that statement in mind that Frey should pay the same price for this grit and gravel as Pine Hill pays?

A The way that paragraph reads, it says "Pine Hill customers", so obviously Pine Hill is not a customer of Pine Hill, based on that statement.

Q Well, before you said that you considered Pine Hill a customer for purposes of dealing. I don't know what your books say, but I assume from what your books said, and you are an accountant, that you treat Pine Hill as a customer. You have to record these sales somehow. Do you treat Pine Hill as a customer?

A Yes.

Q I just want to know, do you require or is it your idea that Pine Hill and Frey should be the same price as a gravel customer?

A The way this paragraph is worded, it intended that Frey

should pay the same price as all of Pine Hill's customers and they should not get any additional benefit beyond the twenty per cent and the two per cent discounts they are presently getting.

MR. WEISS: Did your Honor wish to say something?

THE COURT: No. I just did not want you to interrupt him because we almost have an answer and then the witness is interrupted.

BY MR. WEISS:

Q Can you state if the fact is in your records as you keep them and record the sales and prices of sales to your gravel customers, is Pine Hill charged the same amount for grit and gravel as Frey is charged?

MR. FUZAK: Just a minute, please. I object to that, your Honor, that Mr. Weiss is getting back into precisely the area that your Honor said we would not get involved in and start the whole trial of this case because that is what this amounts to.

THE COURT: I think on that, we are entitled because of the representation or at least the way this could be read in two ways, the affidavit, that Mr. Weiss is entitled to an answer to that question. When you

sell gravel to Pine Hill, there is a charge?

THE WITNESS: Yes, your Honor.

THE COURT: As I understand it, - well, you tell me, without getting into the amount of the charge, is it the same or is it different from the amount that is paid by other customers including Frey?

THE WITNESS: Your Honor, Pine Hill is charged the same price that is charged to all our other customers including Frey.

MR. FUZAK: May I just clarify that, except that, of course, now Frey - -

THE WITNESS: Gets a discount.

BY MR. WEISS:

Q You don't give yourself a discount?

A That's right, we don't.

Q Now, Mr. Moran, you state in that same Paragraph 14, and you can read it from there, that "Frey Concrete is the sole customer supplied from the Peppermint Road gravel plant", is that correct?

A Peppermint Road plant you mean now or - -

Q I ask you. I don't know. You tell me.

A When it was operating, yes.

THE COURT: I think we will take a recess at this time and return at 2:00 to finish up at that time.

MR. WEISS: Thank you, your Honor.

(Recess taken at 12:50 p.m.)

* * * * * * * * * * * * * *

PROCEEDINGS: October 16, 1974, 2:15 p.m.

APPEARANCES: As before noted.

N O R M A N M. M O R A N, a witness called by and in behalf of the Plaintiffs, having been previously duly sworn, resumed the witness stand and testified further as follows:

DIRECT EXAMINATION BY MR. WEISS (Resumed):

Q Mr. Moran, I asked you your connection with Pine Hill. I didn't ask you your connection with Regent Sand & Gravel. Are you also comptroller there?

A Yes, sir.

Q And you said that was a wholly owned subsidiary of Pine Hill. Is it consolidated with it for financial purposes and tax purposes?

MR. FUZAK: If your Honor please, I am going to object to that because that is getting directly into the area that your Honor said that we would not get into on this hearing.

THE COURT: I think so, Mr. Weiss. I think we are concerned with price here to all customers, not particularly to Regent and Pine Hill. Do you sell Regent separately or is it the other way around?

THE WITNESS: The other way around, your Honor. Regent sells to Pine Hill.

THE COURT: All right. Does Regent sell sand and gravel to Pine Hill or other services?

THE WITNESS: Well, primarily sand and gravel in its raw form.

THE COURT: In its raw form?

THE WITNESS: As it comes out of the bank.

THE COURT: Then the sand and gravel which is sold to Frey, is that sold by Regent, is it billed by Regent or billed by Pine Hill?

THE WITNESS: It is billed by Pine Hill, your Honor.

BY MR. WEISS:

Q And then Pine Hill bills itself for what it uses, is that correct? I don . mean you actually mail a bill.

A That's correct.

Q You are an accountant, you know what I mean by that.

A Yes, sir.

Q You keep a book entry of sales and you show a sales account for Pine Hill and a sales account for Frey and a sales account for anyone else.

A Correct.

Q And you enter it in your ledger as an account receivable

for Pine Hill but you don't bill on that account receivable Pine Hill?

A. Bills are made out but you don't actually mail the bill, that's correct.

Q. Do you actually pay the bills?

A. No.

Q. You don't issue a check; it is a bookkeeping - -

A. No, that's correct.

Q. You just charge yourself for purposes of record keeping?

MR. FUZAK: Your Honor, I am going to object again because this is right smack down the same line again.

THE COURT: I will sustain the objection.

BY MR. WEISS:

Q. Do you charge yourself or do you charge Pine Hill a delivery charge for the sand and gravel?

A. Yes, we do.

Q. How much?

A. I don't know really offhand. We have independent truckers do that for us.

Q. Pardon me?

A. We have independent truckers do that for us.

Q. So what you are saying is that right now Pine Hill is charging itself for something - -

THE COURT: Mr. Weiss, you keep staying in the same area and perhaps I am wrong but it seems to me that I made a decision here, right or wrong, that as far as I am concerned the purpose of this hearing is to determine whether or not there should be any continuation of this interim order. It seems to me that this case here, if you go at the depositions and the interrogatories can be prepared for trial and then you can go into all these particular questions with knowledge of the facts, clear knowledge of the facts, with records, definite records and if you have good arguments to make on that line then you will be able to make them and for a number of reasons, Mr. Moran does not have the records here, it seems to me again that it just does not matter for our purposes here what Pine Hill is charging itself or Regent is charging Pine Hill for the sand and gravel. If this is the price which is posted and is available to the trade that is it. If other customers come in and then they have

to pay this price for sand and gravel - -

THE WITNESS: That is right, your Honor, correct.

THE COURT: All right. I am not going to listen to any testimony about the relationships, interrelationships between Regent and Pine Hill.

BY MR. WEISS:

Q All right. Has Pine Hill, - this is a different question, - has Pine Hill increased the delivery charge which it charges itself as of the time that it served this notice of increased delivery charge?

MR. FUZAK: That is the exact same question, your Honor, exact same line.

MR. WEISS: I asked if - -

THE COURT: Mr. Weiss, I sustain the objection to it. I want to give you an opportunity to explore the areas which I think are relevant. If you do not want to do that then we can just have Mr. Moran step off the witness stand. Whether it is an increase or a decrease as far as I am concerned it does not make any difference for our purposes here today.

MR. WEISS: I don't want your Honor or the record

to indicate in any way I acquiesce but I do very respectfully but very strenuously - -

THE COURT: You do not have to acquiesce in my ruling. I do not expect you to if you think I am wrong. You can take an exception to it and certainly I think from our discussion we have had here that it is clear that you feel that you should be entitled to explore into these matters today.

MR. WEISS: Your Honor, our proof indicated that the dire financial shape of the plaintiff in this case and any order that your Honor makes could greatly aggravate that. Your Honor is dealing, you are weighing in your hands the future survival of the company and that is one of the problems we have.

THE COURT: Mr. Weiss, I will listen to your argument when we are finished. If you have further questions of Mr. Moran we will hear those now.

BY MR. WEISS:

Q Mr. Moran, his Honor may rule on this also, do you accord yourself a cash discount?

MR. FUZAK: I object to that on the same grounds, your Honor.

THE COURT: Sustained.

MR. WEISS: Your Honor, I make an offer of proof at this time through Mr. Moran that Pine Hill is realizing a profit either directly or through its subsidiary on sand and gravel involved herein; that the prices which are not actually posted pit prices, but are prices which are used as a competitive weapon, that Pine Hill is realizing this profit at the expense of Frey and using it to finance its lower charging or lower prices of ready-mix concrete and they are using this to drive Frey out of the market. Now, I can only do this if I can ask these questions of him because it is our position that the billing of themself, calling themselves a customer is a fictitious concept. They actually realize a full profit on this.

THE COURT: Mr. Weiss, please, this is all argument.

MR. WEISS: Well, I am trying to make it proof.

THE COURT: I am not going to listen to the proof. I will listen to the argument on it and if you want to make it part of the record you can do it in argument.

MR. WEISS: I have made that offer of proof, your Honor, and I assume you are denying it.

THE COURT: I am denying it and certainly you may take an exception to my ruling.

BY MR. WEISS:

Q Yes. Mr. Moran, the parties defendant in this case also include certain individuals and some companies called Pfohl Brothers, Inc. Is that still in existence, that Corporation?

A To my knowledge, Pfohl Brothers has been dissolved.

Q Pine Hill and Regent stand here in their place as successors, is that it?

A No.

MR. FUZAK: No, no. I object to that.

BY MR. WEISS:

Q Now, you mentioned something about independent truckers. Would you tell his Honor who actually takes the material

from the, or who did take the material, the gravel or the grit from the washing plant, Peppermint Road and Pine Hill, and put it in the hoppers at Frey? Who by name and what category were they?

MR. FUZAK: May I ask what we are talking about?

BY MR. WEISS:

Q. Well, let's say 1971, after June, when his Honor granted the order who did this?

A. I don't know, sir.

Q. Was it an independent trucker?

A. I don't know that either.

Q. You could determine that, though?

A. Yes.

Q. Was it a Pine Hill truck or someone else's truck?

A. It was someone else's truck.

Q. Do you know whose truck it was or is this something you are sure of?

A. I am sure it was not a Pine Hill truck because we don't have any dump trucks. Our trucking is done by outside people.

Q. Now, can you tell me how far as the crow flies is it from a point where the truck would pick up this grit to the hopper that it would take it?

A. I don't know, sir.

Q Is it a couple hundred feet?

A I don't know. I think that Mrs. Muck mentioned it in her testimony earlier pretty accurately, something like two blocks.

Q Is it two blocks as the crow flies or two blocks around the circle?

THE COURT: Mr. Weiss, trucks cannot follow crows' flight. I think they would have to follow more earthly paths.

BY MR. WEISS:

Q Okay. Mr. Moran, do you have any figures of what the costs of trucking this material or delivering it from this batching plant or this washing plant to the Frey hoppers?

A No, I don't.

Q Do you have any figures to support any increase in that same price?

MR. FUZAK: I beg your pardon. I think we are talking about two different things here, are we not?

BY MR. WEISS:

Q No. I am talking about the figures, what it costs to take it from their washing plant to the Frey bins and

whether or not he has any figures about whether there has been an increase in that cost.

A. Our independent truckers have increased their price to us twenty cents a ton since the June Court Order.

Q. Is that twenty cents a ton regardless of the distance the trucker takes it?

A. It is based on a zonal area, territorial zone and if the hauling comes within that zone that is what we are charged by our independent truckers.

Q. Does it cost you twenty cents more a ton to take the material this two block distance?

A. I will say that for anybody that buys gravel from us in that area, our independent truckers charge us, have increased their price per ton, twenty cents and we in turn charge our customers twenty cents.

Q. Well, is it costing twenty cents a ton more to move it those two blocks?

A. I don't know that. We just pay so much to our independent truckers.

Q. Did you ever get a bill from an independent trucker and notice that this was going to cost you twenty cents a ton more to go from that washing plant right on the same property to the Frey hopper?

A. There is no charges done that way. That isn't the basis of the charge.

Q. Did you ever get a quotation or an indication that they wanted twenty cents a ton more to do that?

A. When the original Court Order was issued it was based on what the charge was for that area and at that time it was, I believe, seventy cents a ton and now it is ninety cents a ton and that is how the charge was arrived at in the Court Order.

Q. Would you tell your Honor how many tons a day would you say you were delivering in 1971?

A. I don't know, sir.

Q. A thousand tons?

A. I really don't know.

Q. It varies from day to day, is that right? Well, let me ask you this; did you actually pay out, - Pine Hill from the date his Honor issued the order, seventy cents per ton for carrying that material that two blocks?

A. I don't know what we paid per ton for doing that.

Q. And you don't know what you pay today, do you, for taking it that little distance?

A. I would have to look at the independent trucker's rate of charges.

Q. Regardless of what their rate of charges is, would it cost you that?

A. If I look at the invoices, I could tell you what it cost us.

Q How many truckers are engaged in this project? Is there one man?

A No. We pay a trucking company to do the hauling. Just limited to Pine Hill and Frey. Pine Hill owns the property on which Frey's batching plant is located, isn't that true?

A That's correct.

Q And right next door to it on the same piece of property is the washing plant?

A That's correct.

Q And maybe it is two city blocks to drive from one to the other all on the property?

A Yes.

Q Would you say five hundred tons a day is a fair amount of gravel and grit that goes over that road?

A Mr. Weiss, are you speaking of today, now?

Q Not today, 1971, when his Honor issued an order.

THE COURT: I think the important time is now.

MR. WEISS: I understand that, your Honor.

THE COURT: Another thing, Mr. Weiss, it seems to me a lot of this information, this is what depositions and interrogatories are for.

MR. WEISS: I agree wholeheartedly, your Honor, and these are questions I would ask, but

I need it to answer this motion. Here is my point, and I will make it very brief. Mr. Moran will tell your Honor that there is a certain average tonnage, say it is five hundred tons a day going that two block area, and you take five hundred tons a day at ninety cents that they are trying to get, that is $450 that they are asking the Court to give them per day for one man and one truck and that is a very nice contract to have to truck that. I don't believe they are paying that.

MR. FUZAK: Now, if your Honor please, Mr. Weiss is testifying and he is saying what the circumstances are and what the situation is and I think the witness has indicated you are talking about a zone charge. It doesn't matter whether it is two blocks or five blocks, whatever, but between the two points in the same zone, the charge is the same.

THE COURT: Mr. Weiss, we are not going to go into this today.

MR. WEISS: I ask then, your Honor, to avoid that and not get into that because it is

complicated, is he paying that amount.

THE COURT: He told us they charge now twenty cents additional within the beginning zone. Is that right?

THE WITNESS: That's right.

THE COURT: The first zone.

THE WITNESS: That's right.

THE COURT: Is this particular movement here, is that within the zone charge?

THE WITNESS: Yes, it is, your Honor.

THE COURT: All right. As far as the computation of how this works in with the other charges, you have to go to records, I suppose, right?

THE WITNESS: Yes, I would.

THE COURT: All right. As far as I'm concerned that is as far as we are going to go today.

MR. WEISS: I only ask this question which is different; did Pine Hill actually pay seventy cents a ton for the material which we purchased under the Court Order?

MR. FUZAK: Your Honor, I object to that. He has already testified to that, that those are the charges that are made.

THE COURT: Was that the charge before, seventy cents a ton within the first zone?

THE WITNESS: That is correct, your Honor. That is the zone charge.

BY MR. WEISS:

Q Now, did Pine Hill actually, - you said it was independent trucker. Did you actually get a bill from the independent trucker and did you pay that bill at the rate of seventy cents a ton?

A I don't know. All I know is that if an independent trucker hauled it we had to pay him seventy cents a ton then.

MR. WEISS: My point, your Honor, is, I don't think that they paid and they are charging us seventy cents a ton.

THE COURT: Mr. Moran and Mr. Weiss, as I understand, if I understand English, he just testified that that is the charge that the independent trucker made to you.

MR. WEISS: He is equivocating with your Honor.

THE WITNESS: Your Honor, it might be informative to say that we are delivering material, not from the Peppermint Road plant. He is mentioning that we have just got a

couple blocks' haul. We are delivering from our Genesee Street plant all the way over to your Peppermint Road plant and we are paying independent truckers today ninety cents a ton or the equivalent to to that hauling.

BY MR. WEISS:

Q I asked you about 1971.

MR. FUZAK: Now your Honor, I object. We are not talking 1971. That is past and what we are talking about here is an increase in the base price and he just testified where they are trucking from and what the cost is.

THE COURT: Mr. Weiss has described a movement here.

THE WITNESS: Yes, sir.

THE COURT: That short movement. Are you making that movement today alone, a separate movement so only that would be in the bill?

THE WITNESS: The movement we are making today is that we are paying an independent trucking company to deliver the material from our Genesee Street plant to their plant on

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N. M. Moran, for Pltf., Direct.

Pavement Road.

THE COURT: All right.

BY MR. WEISS:

Q If you will go back to 1971, at that time under the Court Order, we were buying, Frey was buying grit and gravel from you, is that correct?

A That's correct.

Q At the present time Frey is not buying grit from you but only gravel, is that correct?

A That's correct.

Q At the time they were buying grit and gravel from you, were you paying that seventy cents a ton, which is accumulated in this trust fund?

MR. FUZAK: Your Honor, I object to that because again Counsel is trying to redo the 1971 order. That has already been adjudicated by the Court.

THE COURT: Did you comply with the order to the best of your ability?

THE WITNESS: Yes, we did, your Honor.

BY MR. WEISS:

Q Did you pay out that seventy cents a ton?

A I don't know what we paid then. The seventy cents a

ton was established by the Court and based on what the normal charge was for that particular locality and our charge then was seventy cents a ton.

Q. Did you pay seventy cents a ton out?

A. I don't know what our costs were then.

MR. FUZAK: It isn't necessary that it be paid out if it is a cost. I object to this.

THE COURT: Mr. Weiss, there were some monies paid into the escrow fund.

MR. WEISS: That is the seventy cents a ton. We have been forced - -

THE COURT: You know what they paid into that, don't you?

MR. WEISS: No, we pay. We pay seventy cents on their representation that it costs them seventy cents a ton, but I say to your Honor they are not spending seventy cents a ton.

THE COURT: We will go through this one more time.

MR. WEISS: Your Honor - -

THE COURT: Wait a minute. Mr. Moran, you were receiving seventy cents a ton, or seventy cents a ton was paid into the escrow fund, and you charged your customer here seventy cents a ton?

THE WITNESS: That's correct, your Honor.

THE COURT: That money, was that paid, did you receive - -

THE WITNESS: Well, your Honor, what our costs were is something else again, but our charge for that zone was seventy cents a ton. Any customer that bought gravel from us at that time, in that locality, would pay to us, seventy cents a ton.

THE COURT: All right, very well. That, as far as I am concerned, that satisfies us for the present.

MR. WEISS: He has not told your Honor that he parted with seventy cents a ton out of his pocket to this independent trucker and I don't think he did.

MR. FUZAK: Now, your Honor, I object to that now because Counsel is getting the dates and times all mixed together.

THE COURT: Mr. Weiss, I sustain the objection again. This is something you can go into when you get the records and everything else. For our purpose today we are not going to go into the past history. What we are concerned with is today.

BY MR. WEISS:

Q All right. Mr. Moran, is there a reason why you stopped supplying Frey from the Peppermint-Pavement Road washing plant on this property?

MR. FUZAK: I object to that, if your Honor please. There is no requirement in the order or in the contract or anyplace else that they be supplied from that particular washing plant and no relevance to the proceeding.

THE COURT: Is there, Mr. Weiss?

MR. WEISS: No, your Honor, but a point is made now that Mr. Moran says that it costs ninety cents a ton for an outside independent trucker to cart it from some different location to the Frey bins. My offer here, my purpose here, your Honor, is to show that because we are not buying grit from them they are not supplying us from that plant but that if we would start to purchase grit from them again they would supply us from this Peppermint-Pavement Road plant as they did in 1971 and 1972 and then they would not be paying ninety cents a ton to an outside trucker.

MR. FUZAK: Your Honor, Mr. Weiss is testifying again and he hasn't got any testimony that - -

THE COURT: Mr. Weiss, I'm sorry. Perhaps I am being unfair to you.

MR. WEISS: I think you are, your Honor.

THE COURT: All right, but I am not going to listen to it. I will sustain it. You have other ways in which you can cure the defects here.

BY MR. WEISS:

Q Mr. Moran, could you please tell us if you resumed supplying Frey from the Peppermint-Pavement Road plant, it would cost you ninety cents a ton to deliver the material.

MR. FUZAK: I object to that, if your Honor please. That is an entirely hypothetical question and no basis in fact.

THE COURT: I think we have covered this as well as we can without records or without any other information and I will sustain the objection.

BY MR. WEISS:

Q Okay. I will go on then. Mr. Moran, could you tell me if the trucks that are supplying this material, delivering this material are deadheading back or are they picking up a cargo as Mrs. Muck testified and returning with a Pine Hill cargo?

MR. FUZAK: If your Honor please, I object to that as well, because what is the relevance of that?

THE COURT: If he knows he can testify to it. Do you know what they do?

THE WITNESS: I don't know what they do, your Honor. Really, I don't.

BY MR. WEISS:

Q Well, are you in a position to dispute Mrs. Muck's testimony that they do not deadhead back, but pick up a load for Pine Hill?

MR. FUZAK: I object to that, your Honor. He has said that he doesn't know. How can he dispute or affirm that.

THE COURT: It doesn't make a difference whether he disputes it or not, Mr. Weiss, because he says he does not know.

BY MR. WEISS:

Q I show you the first page of your affidavit sworn to September 6, 1974, and ask you to read Paragraph 1 and see if you agree with that now.

A Yes.

Q Have you read Paragraph 1?

A Yes, I have.

Q Do you agree with it?

A Yes.

Q It states here that you are familiar with all the phases of the business of Pine Hill Concrete Mix. Is that true?

A Yes.

Q Who is in charge of the land-fill operation of Pine Hill?

MR. FUZAK: Your Honor, I object.

THE COURT: Sustain the objection.

MR. FUZAK: Thank you.

MR. WEISS: Your Honor, at this time I make an offer to prove for the same purposes as my previous offers and in particular reference to the antitrust aspects and anticompetitive actions of these defendants, that the land-fill operation is being used to subsidize the loss leader sales of Pine Hill which is taking away the

customers of Frey and that is why any price increase here would be disasterous. They are financing their - -

THE COURT: This is not an offer. This is argument.

MR. WEISS: I offer to prove it.

THE COURT: I do not want to hear any argument now. I do not want to hear any offer of proof now. You can give me an argument later.

MR. WEISS: Your Honor, for the purposes of my record here, I would appreciate it if your Honor would reject it.

THE COURT: I will reject it. I do not want to hear any more arguments now. We have a witness here. You ask Mr. Moran questions. I do not want any more offers of proof or no more of "Your Honor this" or "Your Honor that". Ask the witness some questions.

BY MR. WEISS:

Q. This grit pile that is piled up at Peppermint Road and Pavement Road, how long has that accumulated there, Mr. Moran?

A. I don't know, sir

Q Why has that accumulated there?

A Well, I believe it is because of the fact that you, the Frey people, have stopped buying the grit from us.

Q Have you carried and do you now carry that stock pile of grit on your books as an asset?

MR. FUZAK: I object to that, if your Honor please. What relevance does that have to this question?

MR. WEISS: May I be heard on that?

THE COURT: No. Sustained. Next question.

BY MR. WEISS:

Q You state in Paragraph 14, of your affidavit dated September 6, 1974, that it would be devastating if you continued to give Pine Hill, - Pine Hill would continue to give Frey a twenty per cent, plus a two per cent discount from its posted pit price, is that correct?

MR. FUZAK: I object to the form of the question, your Honor That obviously is not - -

THE COURT: Mr. Weiss, didn't we get into this before?

MR. WEISS: Not into that, your Honor.

THE COURT: Fourteen?

MR. WEISS Fourteen we asked about the first sentence and that says as a matter of

survival it is essential that Frey concrete be compelled to pay the same price for gravel that all other Pine Hill customers pay. He is talking about survival in Paragraph 14. Is that referring to the survival of Pine Hill, sir?

THE WITNESS: I would say so.

BY MR. WEISS:

Q And in the second sentence it says it would be devastating. Does that mean it would be devastating to Pine Hill?

A Yes.

Q Would you state for the Court whether or not Pine Hill is presently operating at a profit from its sand and gravel, ready-mix business.

MR. FUZAK: I object to that, if the Court please.

THE COURT: Sustained.

MR. WEISS: Well, I repeat the question generally without limiting it.

MR. FUZAK: I object again, generally or otherwise.

THE COURT: I will sustain the objection.

BY MR. WEISS:

Q What did you mean by the words "devastating" and "matter of survival"? Did you mean a matter of survival of your

business?

A. Yes.

Q. Are you telling me that Pine Hill would go out of business if it did not get these increases it is asking for today?

A. I didn't say that. I said it would be devastating.

Q. And a matter of survival?

MR. FUZAK: Wait a minute. Let him answer, please.

THE COURT: We are not dealing with facts here. Mr. Moran, we have words like "devastating". In other words, would you characterize this as sales talk? I mean you would rather not have this continue?

THE WITNESS: That is correct, your Honor. That is exactly right.

BY MR. WEISS:

Q. And did you state that the reason why this was devastating and a matter of survival is because Frey is the largest customer of Pine Hill?

MR. FUZAK: Your Honor, the affidavit speaks for itself.

THE COURT: We had the testimony this morning also, Mr. Weiss, and from that it seemed

that for the Frey and the sales to its own accounts that certainly outside of the sales to its own accounts, Frey is the largest customer. Perhaps even considering the sales to its own.

MR. WEISS: Yes, the point being any price increases being paid by us, not by them. Our point is it is tailored for us.

THE COURT: That is argument. All right.

BY MR. WEISS:

Q Mr. Moran, you heard Mrs. Muck testify concerning a $22 a yard price. I think it was for wall concrete or for wall men.

A Yes.

Q Could you tell me, sir, if you have anything to do with the computation of these prices or the fixing of these prices?

MR. FUZAK: I am sorry, of which prices? I am not sure.

BY MR. WEISS:

Q The prices at which Pine Hill sells its ready-mix concrete.

A I am aware of price increases.

Q. Does the price, - are you aware of the amount of gravel that is used in a yard of concrete or that must be considered as being used in order to compute the cost of a yard of concrete?

A. I would say I am generally familiar with that, not specific.

THE COURT: Mr. Moran, as I understand, you are the chief fiscal or financial officer of this corporation?

THE WITNESS: Yes, your Honor.

THE COURT: You keep the records, the financial records and so forth?

THE WITNESS: Yes, your Honor.

THE COURT: It would seem to me that a decision whether or not there should be a price increase or decrease that others in the corporation would look to you for assistance and guidance.

THE WITNESS: Yes, your Honor.

THE COURT: Is that in fact what happens?

THE WITNESS: In a general way, your Honor, that is true.

THE COURT: Who finally makes the decision there shall be a price increase?

THE WITNESS: Mr. Kahle, the president does.

THE COURT: Mr. Kahle. In other words, you get all the facts together and you give them to him, is that about it?

THE WITNESS: That is about it, your Honor, yes.

THE COURT: And he may get some information from other sources?

THE WITNESS: That is correct.

BY MR. WEISS:

Q Do you make a recommendation?

A Yes.

Q Well, did you get the facts together and make the recommendation for the price increase now before the Court?

A Yes.

Q And was the primary purpose of this as stated in your affidavit to force Frey to buy your grit?

MR. FUZAK: Object to the question, improper question. There is no foundation in fact. It is not stated in that fashion in the affidavits. Mr. Weiss has on occasion in the past - -

MR. WEISS: I will withdraw it.

MR. FUZAK: Just a minute, let me finish. Mr. Weiss has on occasion in the past taken

out of context certain small portions of the affidavits.

BY MR. WEISS:

Q Who is Mr. Robert E. Jones who submitted an affidavit on your behalf sworn to September 6, 1974?

A He is in charge of sand and gravel operations.

Q Is he an officer of the corporation?

A I believe he is.

Q What office does he hold?

A I am sorry. I don't think he is an officer.

THE COURT: Mr. Weiss, I thought we were going to conclude this this morning and we are going to conclude it very soon because we are here on a very, very narrow issue and I am going to conclude this hearing. I told the other lawyers to come back at 3:15 and we are going to stop. When they come back we are going to stop so as far as information, get it in before that, please.

BY MR. WEISS:

Q Mr. Moran, did you read Mr. Jones' affidavit which was submitted together with yours on September 6, 1974?

A. I believe I did some time ago.

Q. I call your attention to Paragraph 9 of his affidavit and particularly the last two sentences or the last sentence, and ask you if you would read that. Would you read the last two sentences out loud for the Court and for yourself?

MR. FUZA[illegible]: I am going to request the whole paragraph be read outright.

MR. WEISS: All right, the whole paragraph, your Honor.

THE COURT: Why don't you read it out loud and then we will all have it and you can ask questions on it.

THE WITNESS: Paragraph 9 reads, "It is unfair for Pine Hill to be compelled to sell Number 1 and Number 2 gravel which is in short supply to Frey Concrete and have Frey Concrete refuse to buy our sand or grit which is automatically produced as an integral part of gravel production. Frey Concrete is Pine Hill's largest customer and used to buy all of its grit from Pine Hill but its refusal to purchase grit, this has caused the large inventory and has been one of the factors

in requiring the price increase for gravel".

BY MR. WEISS:

Q Would you state for the Court that that is true, what Mr. Jones says, that the refusal of Pine Hill or Frey to buy this gravel, the grit, for whatever reason, has been one of the factors in requiring the price increase for gravel.

A Well, costs have gone up in the production of gravel.

THE COURT: I think that the grit is sitting there, it is piling up, you cannot sell it, but in the meantime in order to comply with the Court's order you have got to continue to shovel out the gravel and put it through the processing plant so - -

THE WITNESS: That's right.

THE COURT: In order to continue your business you have got to get your money from someplace, is that right?

THE WITNESS: That is correct.

THE COURT: So that in order to stay even this means that since you can't sell the grit you have to increase the price of the gravel, is that putting it in laymen's

terms?

THE WITNESS: I think that is put very well, your Honor. That is true, what your Honor has said.

BY MR. WEISS:

Q Have you considered the alternative or any alternative, Mr. Moran, complying with any reasonable request on the part of Frey to have the gravel comply or the grit comply with their specifications and desires?

MR. FUZAK: I object to the question. That is a "when did you stop beating your wife" type of question.

THE COURT: I do not think it is answerable so I will sustain it.

BY MR. WEISS:

Q Are you aware of reasons why Frey is not buying your grit or tne reasons why Frey as Frey has stated, for not buying your grit?

A Yes, I am.

Q Are you aware of the fact that they have complained of the excessive moisture and the presence of dirt?

A I am aware that they have made allegations to that effect.

Q. Without trying to bind you in saying they are right or wrong, have you considered making any modifications to the washing plant that supplies Frey on Peppermint and Pavement Roads to comply with their requests, whether they are reasonable or unreasonable?

MR. FUZAK: I object to the question because I think it is a misstatement of fact because the washing plant on Peppermint Road doesn't supply, as I understand it.

BY MR. WEISS:

Q. Let's start again. Is the Peppermint-Pavement Road washing plant that has this pile of grit on hand?

A. Well, we have piles of grit at all our plants and Peppermint Road is one of them, yes.

Q. But there is a great big stockpile there?

A. Yes.

Q. And this is the material that Frey refuses to buy?

A. They refuse to buy our grit not only from the Peppermint Road plant but from our Genesee Street plant or any of our grit.

Q. Did you offer to sell Frey grit that was washed at one of your other plants?

A. We have delivered to Frey from our Genesee Street plant in the past. In the most recent past the material they

have bought has come from our Genesee Street plant.

Q. Grit?

A. That is what I am talking about.

Q. Have you ever been or are you now willing to supply Frey with grit which is washed at a plant other than the Peppermint-Pavement Road plant?

MR. FUZAK: That is two questions, your Honor.

BY MR. WEISS:

Q. I will separate it. Are you now prepared to sell Frey grit which is washed and screened at a plant other than the Peppermint Road- Pavement Road plant?

A. I would say yes.

MR. FUZAK: I'm just making an objection because that implies that they were previously unwilling to do that which is not in the testimony.

BY MR. WEISS:

Q. I assume you would be prepared to sell them the grit which is washed and screened at the same plant that does so for Pine Hill for its gravel?

A. Yes.

Q. All right. Do you recall that in 1958 or so that Pine Hill when it purchased this plant on Peppermint-

Pavement Road from Pfohl sold off the improvement to the plant that Pfohl had planned to install?

MR. FUZAK: I object to that, if your Honor please.

THE COURT: I will sustain it, Mr. Weiss.

MR. WEISS: The purpose of this, your Honor, is to show this plant at the Peppermint-Pavement Road which we were using under this Court Order which did not produce the grit had a modification about to be installed to produce satisfactory grit or we would have not have been in this problem today.

THE COURT: I will sustain the objection. I am not going to listen to that history here today at this particular hearing.

BY MR. WEISS:

Q. Did you, Mr. Moran, aid in the preparation of Mr. Kahle's affidavit on the schedules that are submitted to the Court dated June 24, 1974?

A. No.

Q. Did you read the affidavit?

A. I believe I did, some time ago.

Q. And in Mr. Kahle's affidavit there is a schedule of

increased prices there. Are you familiar with that?

A. Yes.

Q. Did you aid in the preparation of that?

A. Yes.

Q. So you did prepare part of his affidavit?

MR. FUZAK: I object to that. That is a misstatement.

THE COURT: I understand. The Exhibits, they were prepared - -

MR. WEISS: Exhibit D.

THE COURT: By you, is that it?

BY MR. WEISS:

Q. Would you like to look at that?

A. Yes.

Q. Now, in this you state that various, or Mr. Kahle states, but you prepared this, that various items have gone up such as processing equipment, crusher parts, screening parts, steel parts, heavy equipment. During the period of time involved, did you purchase any of these items in connection with any material you were supplying to Frey?

A. I don't know that. I would think so. I don't know that.

Q. For example, you state here heavy equipment, Caterpillar D-8 Tractor. Did you buy one of those?

A. Yes.

Q. In connection with Frey?

A. May I look at that for a minute, please?

Q. Sure, right here.

A. We have the dealer listed there, that is who we bought it from.

Q. Well, did you buy it in connection with your supplying of Frey?

A. We bought it to use in our business.

THE COURT: You bought it to use in your business?

THE WITNESS: That's right, your Honor.

THE COURT: I will accept that answer and I think, Mr. Weiss, with all the other customers here, we are not requiring him to say he bought it just for Frey or he didn't buy it for Frey. You used it for all your work?

THE WITNESS: That is exactly right.

BY MR. WEISS:

Q. Did you buy it in connection with the sand and gravel operation or did you buy it in connection with another one of your operations?

A. In connection with our sand and gravel operation.

Q. You list here wages, operating engineer, ten dollars and sixty-one and a half cents.

THE COURT: Excuse me, Mr. Weiss, what page?

BY MR. WEISS:

Q. This is Exhibit D. You list operating engineer $10.61, is that correct?

A. That's right.

Q. That is not the union rate in this area though, it is higher, isn't it, then the union rate, $9.88 or $9.86?

A. I don't know exactly but those figures are correct that are on that schedule.

Q. You prepared them?

A. Under my supervision, they were prepared.

Q. You didn't check the book then yourself?

A. Which book?

Q. The union book, the wage book.

A. No, I didn't. It wasn't necessary for me.

Q. Is it safe and fair to say, Mr. Moran, that in every phase of your business, in your concrete ready-mix business, you have had substantial price increases during the period we are talking about?

A. Are you referring to price increases in our costs?

Q. Yes.

A. I would say we have had hefty price increases, yes.

Q. All the way down the line?

A. I wouldn't say all the way down the line but intermittently.

Q. Have you had price increases in this period of time of the components and the factors that go into making up the cost of producing a yard of concrete by Pine Hill?

THE COURT: Mr. Weiss and Mr. Moran, we have Exhibit D here which you have indicated some of the price increases from December 1, 1970 to April 1, 1974, is that correct, Mr. Moran?

THE WITNESS: Yes, your Honor.

THE COURT: And these figures were prepared under your supervision?

THE WITNESS: That is correct.

THE COURT: And that was done just as accurately as you possibly could make it?

THE WITNESS: That's right, your Honor.

THE COURT: So in each category, fuel, and electricity, wages, equipment, supplies, taxes that there has been and you have indicated a percentage increase and there has been an increase in each one of these categories?

THE WITNESS: That is correct, your Honor.

BY MR. WEISS:

Q All right. Now, having in mind these increases, have you averaged out these increases to determine what the average this increase is as it affects your business?

MR. FUZAK: I object to that. I don't think that is - -

THE COURT: Sustain the objection. It seems completely unanswerable and not helpful even if he did go through the work to do it.

BY MR. WEISS:

Q Exception, your Honor. Mr. Moran, can you tell me if you increased the price of a yard of ready-mixed concrete of the wall type that Mrs. Muck testified to that you are selling at $22.00 a yard, have you increased the price of that to keep pace with the increased cost which is mentioned in this Exhibit D that you have prepared?

MR. FUZAK: Just a minute. Your Honor, we are not here talking about concrete prices, your Honor. It has nothing whatsoever to do with this issue. We are talking

about the prices of sand or grit and gravel. Now, there are a lot of things, a lot of factors obviously that enter into the determination of a price increase such as productivity, efficiency and so on.

MR. WEISS: I know I am being repetitive, but where your competitor acquires your source of gravel a different ball game exists.

THE COURT: It also might mean what other competitors are charging in the area as well, including the sales of others in sand and gravel, including Granat, Buffalo Gravel and all the rest of it.

MR. WEISS: My point, your Honor, is - -

THE COURT: Mr. Weiss, I have heard enough on this. I do not want to hear any more testimony on this particular. I think you have made the case but we have gone about as far as we can go. I want to ask you some questions.

MR. WEISS: Yes, your Honor.

THE COURT: As I understand it we are in sort of a ridiculous situation if I get the

picture correctly. One is, you do not really, you do not want to buy from your competitor here. You do not want to buy from Pine Hill at the suggested price list and as I understand it, Mr. Fuzak, if you sell you would want to sell at the suggested price list but you not only want to sell gravel but you want to sell grit as well.

MR. FUZAK: Yes, sir.

THE COURT: Do I understand that correctly?

MR. FUZAK: Yes, sir.

MR. WEISS: You didn't understand me. I didn't agree with the first thing you said.

THE COURT: I am sorry. What is your position?

MR. WEISS: Our position is this, we do want to buy and we need to buy in order to survive but under the terms set forth in the contract and we need interim relief. We would like it either to be status quo as set forth in the contract, your order of June, 1971 was not as set forth in the contract. We would love to buy,to survive,either at the price set forth in the contract or at the price that it

actually cost Pine Hill to produce plus a reasonable profit for them for producing it. In other words, we don't want to be - -

THE COURT: Mr. Weiss, in order to make that determination, we have to have a lot more evidence and a lot more exhibits, as a matter of fact, try the case so that we are all in a dilemma here.

MR. WEISS: But it is still cheaper - -

THE COURT: We are not ready to try the case and it seems to me that to have an order here which requires the Pine Hill Company to sell to your company, but your people refusing to take the grit is unfair to them.

MR. WEISS: No, your Honor. We are not, - we have always been ready to take grit. We still are ready.

THE COURT: All right.

MR. FUZAK: Sir, I would like to respond.

MR. WEISS: We are ready to buy it today, your Honor.

MR. FUZAK: If I may very quickly, and I think Mr. Moran would agree with this statement,

to shorten the process, we have been ready and willing and have offered to sell to them and they refused grit which was produced by the same plants from which Pine Hill gets its own grit and has been using that grit without problem in its concrete and that's been the case all the way here, all the way through here from the time they discontinued in 1971 or '72 to the present.

THE COURT: What I want to do, Mr. Weiss and Mr. Fuzak, I want you to, - you give me a memorandum and you give me, as you did before, a plan, a suggested plan or plans.

MR. WEISS: Thank you.

THE COURT: About what we can do here and also as far as there, you know I said before I would be willing to listen to your argument but this is a complicated affair and I want to be able to understand your argument and I can do it best if I read your argument. As you know I have referred this to the Magistrate to supervise. He, I know and as you know, you have both delt with him, that he is and will set

other things aside so that he can meet with you in a regular fashion and his door is open. If anyone has any problem you can go in there and you can get resolved, and because of things just beyond my control here the Court just does not have the time to do it all the time, but I, and the Magistrate, we want to cooperate. We want to get rid of this most involved lawsuit but it requires the cooperation of everyone.

MR. WEISS: But, your Honor - -

THE COURT: As far as this particular situation is concerned, when, as far as getting to me your proposal, how long will it take for you to do that?

MR. FUZAK: I think we could do it in five days, your Honor.

THE COURT: Mr. Weiss, what about you?

MR. WEISS: I would think that by the end of next week, your Honor.

THE COURT: The end of next week. I will, as far as my calendar, expect to receive it by the 21st at any rate and then if I, - I may have you back to talk about it, to

ask you some questions about it.

MR. WEISS: Well, your Honor, today is the 16th. I think you meant the 28th.

THE COURT: I'm sorry. As far as my calendar, the 29th. In other words, you send your proposals in toward the end of next week and then I will be in touch with you as soon as I can.

MR. WEISS: May I ask your Honor, will you give much consideration to having us come back, the both of us, coming back for argument, no witnesses. I think it will be very helpful.

THE COURT: All right, I will be probably better able to discuss it then.

MR. WEISS: Your Honor, with this case being settled and I don't know Mr. Fuzak's priorities but I would be available to continue this examination of Mr. Moran on very short notice.

THE COURT: I have the affidavit. Frankly, as far as I am concerned, something like this ought to be able to be decided on the affidavits so I wanted to give it more time and so we have had the hearing

but I do not think we should give any more time to it then we have given thus far.

MR. FUZAK: Mr. Weiss has consumed the time so I don't have any time to ask Mr. Moran any rebuttal questions.

THE COURT: I have your affidavits and Mr. Moran's affidavit.

MR. FUZAK: All right, sir. Thank you.

THE COURT: We will listen to argument later.

MR. FUZAK: Thank you very much.

MR. WEISS: It will not be on the 29th?

THE COURT: No, it will be shortly after the 29th. We will be in recess.

(Recess taken at 3:15 p.m.)

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**Transcript of Further Proceedings Before Court,
January 20, 1975.**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

GEORGE C. FREY READY-MIXED CONCRETE, INC., et al,

Plaintiffs,

-v-

CIVIL DOCKET
NO. 1970-277

PINE HILL CONCRETE MIX CORP., et al.,

Defendants.

* *

Proceedings held before the HON. JOHN T. CURTIN, United States District Judge, in Part I, United States Court House, Buffalo, New York, resuming on January 20, 1975.

APPEARANCES: RAICHLE, BANNING, WEISS & HALPERN, Attorneys for Plaintiff; ARNOLD WEISS, Esq., of Counsel.

MANZ & MANZ, Attorneys for Defendant; by VICTOR E. MANZ, Esq.; HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR, of Counsel, by VICTOR T. FUZAK, Esq.

PROCEEDINGS: January 20, 1975.

APPEARANCES: As before noted.

THE COURT: As I understand it, Mr. Weiss, first you wanted to defer this argument until sometime in February.

MR. WEISS: Yes, your Honor.

THE COURT: But you are here now.

MR. WEISS: Well, this all happened, this usual comedy of errors, I was going out of the country on business and I came down to the office Sunday to get my papers and I noticed on Saturday, apparently Mr. Fuzak's motion had come in for summary judgment and for dismissal and I wrote a note to my secretary to ask Mr. Fuzak to get an adjournment and if she was unable to get one, to have Mr. Stephens file an affidavit I had drafted. My secretary did both. She got the adjournment and she filed the affidavit. Mr. Fuzak believes that in view of the fact he granted the adjournment and then in view of the fact that this affidavit was filed, that maybe he is being put in a disadvantageous

position by not coming here today and I can understand his position. I apologized for sending the affidavit after he had granted the adjournment, but I think he feels, and he can speak for himself, but I am sure he believes that if there is any adjournment now, your Honor should grant it.

THE COURT: Let me see if I have it. I have your motion here filed January 11th with affidavit, your affidavit. It must be the 13th, filed January 13th, and also the affidavit of Mr. Moran.

MR. FUZAK: That is on the primary motion for dismissal of the complaint, your Honor, that affidavit of Mr. Moran.

THE COURT: Filed on the 13th. Mr. Weiss, you said that you filed a response?

MR. WEISS: Well, Mr. Stephens filed an affidavit your Honor. I think that would be filed last week sometime.

THE COURT: I saw that and I don't have it before me.

MR. WEISS: Sworn to January 13, 1975 and the import of the affidavit is to ask for an

adjournment, ask for a deferral.

THE COURT: Did you file an affidavit on the merits?

MR. WEISS: No, your Honor.

THE COURT: You have not?

MR. WEISS: No, but the affidavit Mr. Stephens filed attempts to touch on the merits only to show a reason for deferral, but it is not a full affidavit on the merits.

THE COURT: How much time do you need to file an affidavit on the merits?

MR. WEISS: Well, your Honor, I am starting a trial tomorrow morning. It should take two weeks. Four weeks, if that would be all right.

THE COURT: Mr. Fuzak, it seems to me your motion is quite extensive here.

MR. FUZAK: Yes. There is no question about that, your Honor. I understand and I am perfectly willing to accommodate counsel. There is no problem on that and when I did receive the call from Mr. Weiss' secretary requesting an adjournment to February 10th because he was then in the Virgin Islands and was not due back until today, I understood,

and then was on trial for two weeks, I said I thought that would be necessary and agreed to that and then, of course, I got the motion for a complete deferral of my motion to dismiss until the time of pretrial conference before the trial and that is what I am here basically to oppose that.

THE COURT: You oppose that?

MR. FUZAK: Yes, indeed I do.

THE COURT: Mr. Weiss, you now agree that we ought to take up the motion of Mr. Fuzak on the merits and that if you have - -

MR. WEISS: No, your Honor.

THE COURT: You do not agree, but at least you agree to face up to it, to respond to - -

MR. WEISS: I would say this, your Honor; I would be prepared to respond to it when we have completed our discovery. I would hope that by that time our discovery can be completed.

THE COURT: You mean in thirty days?

MR. WEISS: Pardon me?

THE COURT: In thirty days?

MR. WEISS: Yes.

THE COURT: You want thirty days in which to reply to Mr. Fuzak's motion and his affidavit?

MR. WEISS: Yes, your Honor. At that time we may still ask for the statutory deferral under Rule 56. That is, this is not an appropriate time to ask for summary judgment.

THE COURT: You need more information?

MR. WEISS: Yes.

THE COURT: In the meantime, you have before the Magistrate, certain motions?

MR. WEISS: Yes, your Honor, on discovery.

THE COURT: On discovery.

MR. WEISS: And no discovery is going forward at this time. We are waiting for a decision from Mr. Maxwell, Magistrate Maxwell.

THE COURT: As I understood from his note, he said that he had that under consideration, but in the meantime there were certain areas in which everyone agreed that discovery could continue on and that would be progressing.

MR. WEISS: No, your Honor. I think, if my recollection serves me, I believe that the

parties mutually agreed that because of the extensive nature of the objections that there were so few areas that it could go forward on that it would be better to wait. Now, we are prepared to go forward on these limited areas, but I think even some of the books they - -

MR. FUZAK: Let me make that plain, if I may, your Honor.

THE COURT: Did Mr. Maxwell indicate he was going to decide that, when he was going to decide that?

MR. FUZAK: I might say that there isn't any agreement to that effect. That was an election on the part of the plaintiffs, that they determined that it would be better for them to wait until after the decision of Mr. Maxwell and then continue, but we have opened those books that we are agreeable to giving to them and have had two days or parts of two days on those. My position is that I think that this is a motion that is a threshold kind of motion and it attacks the sufficiency of the complaint itself, aside from other

questions of summary judgment. It also attacks the jurisdiction of the Court and I think there are materials already before the Court which establish those basic facts and to which response can be made by affidavit and I do think, your Honor, that since it is a threshold type of motion, that it ought to be heard and determined at the earliest possible time. I understand counsel's position and I am certainly willing to make accommodation in that respect, but I do argue against any deferral of the motion under Rule 56 or otherwise. I don't see that there is any basis for such a request.

MR. WEISS: Right now, all I am asking for, your Honor, is an adjournment of this motion, the return of this motion for four weeks.

THE COURT: Mr. Weiss, the thing is that I am willing and Mr. Fuzak is willing to give you time to prepare, but when we have the answer here, it ought to be made as completely as possible.

MR. WEISS: Yes, your Honor.

THE COURT: And not simply a two-page affidavit

saying, "Judge, this should be deferred until after all the discovery is completed and I will be ready for trial".

MR. WEISS: The deferral would not be on that basis, your Honor. If the deferral, - the deferral on Rule 56 is on a different basis, I believe, and we would not ask for it just that we need more discovery.

THE COURT: He moves here under Rule 12. Under Rule 12, you just state, failes to state a claim and it really is more of a legal argument than it is an argument on facts.

MR. FUZAK: Yes, sir.

THE COURT: Then you do say that in the alternative, you are entitled to summary judgment?

MR. FUZAK: Yes, sir.

THE COURT: Then it becomes factual.

MR. FUZAK: Yes, sir, but there are certainly two basic aspects of the motion. One is certainly clear as a legal question, and that is the sufficiency of the complaint and that could be argued anytime at the convenience of counsel as we are here today and the other one on jurisdiction,

again, that is a matter that can be responded to in terms of affidavits and that is normally done.

THE COURT: Do you have a memorandum? Is that included, your legal memorandum in support of your motion, Mr. Fuzak?

MR. FUZAK: No, sir, it is not, but I will have one. I did not present it at this time because I understood there would be a deferral of the motion for some period of time.

THE COURT: When do you think you can have that ready?

MR. FUZAK: Well, I would think that it would depend, somewhat, on the extent of the adjournment.

THE COURT: We talked about thirty days. If I say thirty days, - in other words, I would like to have it before we have any oral argument on this.

MR. FUZAK: I think I would have it completed if it was agreeable by a week before the argument and filed with your Honor and Mr. Weiss.

THE COURT: The trouble is that on the day of

his response, I suppose the papers may be voluminous and it would be difficult for me to grasp everything unless I have a chance to read the papers.

MR. FUZAK: Yes, sir.

THE COURT: I do not want to put this off any further, but I want to get your best judgment about how to proceed. Should I get your legal memorandum within this period, thirty day period or should we wait until Mr. Weiss responds and then you can both file memorandum on the law or what do you suggest?

MR. FUZAK: I don't want to delay it any more than anyone else does. I do think that the latter suggestion is probably the more expeditious one if Mr. Weiss does file his responding papers within a set period of time and that within some set period of time after that, we both file our memorandum of law and I file any responding affidavit, replying affidavits that I may have to in connection with his papers.

THE COURT: I suppose that may be done a couple of weeks afterward?

MR. FUZAK: Yes, sir.

THE COURT: I think at the same time, you should be able to contemporaneously file a memorandum, Mr. Weiss, and then at that time we will set a date or maybe I can set a date for argument now. Why don't we do this; we will direct that you file your affidavits in response, Mr. Weiss, by the 24th of February; that the legal memorandum for both sides will be filed by March 10th and I will hear oral argument on the motion March 17th at 2:00 p.m. In the meantime, I suppose the Magistrate will make a decision on the motions pending before him on discovery and I trust whatever his decisions are, that if he directs that discovery proceeds, then it will proceed and if he says not, I will just have to leave that to his good discretion because he has been working on this day in and day out and he knows the problems.

MR. WEISS: Well, your Honor, Mr. Fuzak did refresh my recollection. It was our decision at the time because of the limited papers

available, and I think I communicated with him and I became confused that that was an agreement, that we communicated to him that in view of the limited nature, it would be cheaper for us to go in and do it all at once because we would have to go back and look at the same papers again because there are certain books that are handed to us, there are certain parts of the books you can't look at. Now, if it is - -

THE COURT: Let us say the motion before the Magistrate, will that resolve that?

MR. WEISS: Yes, your Honor, that would resolve that.

THE COURT: Then it would seem to me that he may decide, he knows what the schedule is, he will be informed about what the schedule is here and I don't know how he will decide the motion.

MR. WEISS: With your leave, your Honor, and Mr. Fuzak's, I would call him orelse Mr. Fuzak and I would go down now and we would ask him would he prefer we proceed on the limited basis for the time being or to

wait for his decision. It is more costly for us to have the accountants come in and come back again to really go over some of the same records.

MR. FUZAK: One of the problems we face here, Judge, very frankly, is this, that in our opinion, as reflected in those moving papers, the complaint as it has been before the Court for the past three odd years is insufficient on its face and should be dismissed. One of the problems that we face is that in our opinion the discovery being sought by deposition and otherwise is being sought for the purpose of attempting to discover some basis to amend the complaint so as to make it an appropriate and proper complaint and I just suggest, your Honor, that I don't think that is an appropriate way to proceed and I don't think it is appropriate to have discovery and inspection for the purposes of framing the complaint. I think in the affidavit before the Court today, there is reference to this anticipation by the plaintiffs that they intend

to amend their complaint after they have discovery and inspection and we are faced with that kind of a problem because we are in a competitive situation and we just raise the question as to whether it is appropriate with a complaint that we say is very clearly deficient on its face to allow discovery and inspection until that issue is decided because the discovery and inspection that they want to get into involves competitive information and confidential information.

THE COURT: Do I understand, Mr. Weiss, that as far as whether or not the inspection ought to go on between now and when I decide this motion that you agree with Mr. Fuzak that it should be put off?

MR. WEISS: Not at all, your Honor. I think it should go forward and perhaps we should have continued going forward on this limited area, but I will say this, this case was started in 1970. The facts set forth in the complaint are not all the facts that we would try. Inevitably and naturally in these cases, the plaintiffs

learn more about their case as they get into it and the plaintiffs are very much more educated now. A complaint was filed charging a conspiracy and a monopoly and an illegal acquisition. It turns out that plaintiffs' or defendants' conduct is far more aggravated than was even conceived at the time. I don't think we should be precluded from bringing these out. We said in the affidavits before the Court and arguments before this Court and in affidavits filed with the Magistrate what these things are that we charge them with, other things that are specifically alleged in the complaint. This is known as pleading and I don't think it is any surprise to them.

THE COURT: Let us do this. I have referred this to the Magistrate for resolution. If you believe, Mr. Fuzak, that there should be a stay of discovery pending this motion then you ought to make the appropriate motion before the Magistrate.

MR. FUZAK: Thank you very much, your Honor.

MR. WEISS: Thank you, your Honor.

**Transcript of Further Proceedings Before Court,
January 20, 1975.**

THE COURT: Mr. White, will you send a confirming notice, please, to both sides and put it in the book and return the file. We will be in recess.

(Recess taken.)

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Transcript of Proceedings Before Court, May 12, 1975.

PROCEEDINGS: May 12, 1975.

APPEARANCES: As before noted.

THE COURT: Before we begin, do I understand, Mr. Weiss, you were going to have prepared a proposed amended complaint?

MR. WEISS: Yes, your Honor, and I am embarrassed. It is not quite finalized yet.

THE COURT: That, of course, can only be filed if the Court gives you permission to file it.

MR. WEISS: Yes, and this would not constitute service what we are asking leave to file.

THE COURT: By the motion that you are thinking about filing, does that mean to say that you say there is merit to the defendants' motion directed to the original complaint?

MR. WEISS: No, we do not concede any merit, your Honor, but very often, as the case progresses, both parties learn more of their case and I would say we are much more informed than we were originally. I would also say, however, that unlike most of the cases, even those Mr. Fuzak has cited, there has been, for all practical

purposes, no substantial discovery by the plaintiff in this case and we have not gotten into what extent they are engaged in commerce.

THE COURT: Let me ask you this; of course, the main item that Mr. Fuzak makes the argument, and he can certainly make them much better than I do, it seems to me the main point here is that there is no interstate commerce.

MR. WEISS: Yes, your Honor.

THE COURT: Before the Copp case came down last December, - I suppose since some of the product went to interstate facilities, but now that we have the Copp case, that seems to be very definite word that no matter if you had all of your aggregate going onto interstate roads, it wouldn't make something which is purely local in character interstate.

MR. WEISS: I would say, your Honor, that is true unless that situation your Honor proposed would have an effect itself on interstate commerce or that the purpose of it was to affect interstate commerce and I think the

Supreme Court noticed that in their opinion but the Supreme Cou t also expressly stated there was no such showing in that case. However, that case, that decision was under the so-called Clayton Act and its amend ments, the Robinson-Patman Act and the Court did not decide the Sherman Act did not apply and there have been numerous instances where the Sherman Act was applied to this industry.

THE COURT: Why should we, at this stage, Mr. Fuzak, why should this complaint be dismissed and should it be considered as a motion for summary judgment now that we have had discovery or should it be on the complaint only and is it the, - is there any merit to permitting Mr. Weiss to continue with discovery?

MR. WEISS: Your Honor, the motion, a dual motion, as a matter of fact, it is a motion under Rule 12 for dismissal of the complaint on the grounds the complaint is insufficient on its face to state a cause of action and also a motion under Rule 56 for summary judgment on the

grounds, as a matter of fact, there has been no showing of any jurisdictional facts to support the action being brought in this court. I think this about the whole situation, this action was started in June, 1970. That is five years ago. It seems to me that the plaintiffs here have had ample time to determine what their case is or what their case isn't. The defendants have been brought to court and they have been put to very material expenses and there have been a lot of pretrial proceedings of one kind or another and all this occurred on the basis of the complaint filed. That complaint we are talking about today I submit to the Court is completely insufficient on its face to state any cause of action because when you get through taking out of that and you have considered all of the conclusary allegations and all of the inflammatory accusations and so forth and all that kind of language, you get down to the point there have been no facts stated which indicate a violation of the Sherman or

Clayton Act or any of the antitrust acts. The Court and counsel themselves are entitled to have some specification. What is it that these defendants presumably did that constitutes the violation of the acts claimed.

We do not have this in this complaint, your Honor. There is nothing in this complaint that indicates, number one, what role any particular defendant played in this particular conspiracy. There is not a word about that. There is not a word saying what Mr. Ludwig Kahle or what the Pfohls individually did. The Pfohls have been out of business and aren't in the business and haven't been in business for years; not a word about what Pfohl Brothers, Incorporated did that was in violation of the antitrust acts. That corporation has been non-existent since 1957 or 1959. There are no facts alleged which would tell this Court or tell the defendants what it is they have done which it is said is a violation of these two acts, the Clayton Act or the Sherman

act.

Not only that, but there are no facts alleged in this complaint as to why the plaintiffs' claim should come here at all. We don't know. I don't know and I don't think the Court knows because the complaint doesn't tell us. We know what business we are in. We know what business the plaintiffs are in and we know what business the defendant Pine Hill is in. They are not in interstate commerce which is the test. These people, Pine Hill, produces sand and gravel and it does so locally. It has customers in the State of New York and, in fact, none outside of Erie County. It has no business in the sand and gravel business outside of the State of New York. They also make ready-mix concrete and that is, by its very nature, a local intrastate activity and there is no allegation any of that ready-mix concrete goes outside the State of New York, so really, what we are dealing with, on the face of it is an intrastate business, and inherently, intrastate by

the very economics of the business itself and we are not told in this complaint in what respect this case is an interstate commerce case. The only thing we get are some broad general conclusary allegations to the effect that some of the concrete that is manufactured by both these parties and also by others who are employed in this business in this area, and I think that is something to be considered also, these are not the only two companies in this business. There is very major competition going on in this business in this area and there is no question that some of this concrete is used for interstate highways, I suppose, and some of it may be used for runways at the Buffalo International Airport and so on and so forth, but whatever, you have to be able to allege and prove it is a violation of the protection of the Clayton Act that the companies involved here actually are involved in interstate commerce and it cannot be shown here and I submit to the Court

our papers are very clear on that point and they are not refuted and you have no showing of any kind and it seems very clear to me that, therefore, we are entitled to dismissal of the complaint so far as it relates to allegations of violation of the Clayton Act on the insufficiency of the complaint to state any cause of action and the failure to show any interstate commerce within the meaning of the Clayton Ac as more recently interpreted by the Copp decision.

In addition to that, I think we are clearly entitled to dismissal of this complaint as it purports to relate to allegations of violation of the Sherman Act because again, your Honor, there is no specification of fact in that complaint whichever purported to show any kind of restraint of interstate commerce or an act in monopolization of interstate commerce, not a one.

If your Honor were to look at the complaint, your Honor won't find a factual statement. What you will find, really, is

an allegation of breach of contract. The basic allegation made here is that the nine defendants or some of them, at least, presumably breached a contract entered into back in 1957. That is the case and it doesn't belong here in Federal Court. That alleged breach of contract does not constitute a restraint of trade nor does it constitute a monopolization or an attempted monopolization. If you can't show the articles we are concerned with here are flowing in interstate commerce either in their independent nature or as part of products that are shipped across state lines and so on, then you must be able to show what is happening which constitutes a restraint of trade or a monopolization which has a direct and substantial effect on interstate commerce, and once again, your Honor, you can look at the complaint as I have done hour after hour, almost, and you will not find any kind of an allegation of fact which would disclose to this Court or to these defendants what market it is we are talking about,

What is the interstate market and the restraining of trade that is claimed here. What is the nature of the restraint of trade claimed here and, in fact, what interstate commerce is being affected directly, indirectly, substantially or insubstantially. You will not find a single allegation in that complaint, nor will you find anything to support the claims of jurisdiction in the papers before the Court and the testimony before the Court. On the contrary, I think, what you will find is that these companies are very peculiarly involved in an intrastate highly localized activity which must be localized by its very nature and that they do not involve interstate commerce and I think to talk now after five years before this Court and all that has been going on here and all the opportunity that has been had and is currently being had for examination of the records of these defendants, to talk now of not having an opportunity to find out what the facts are in this case is unacceptable and I think the Court

ought to find it unacceptable.

These people are competitors. There is no question about that, and they are hard competitors, both sides are, and to allow a case to go on on the basis of a complaint that is clearly insufficient on its face with some rather vague and unverified presumptions, that somewhere along the line, we are going to get an amended complaint if the Court permits, which I think is just not permissible. I think it is an imposition on the Court's time and an imposition of these defendants. I think we ought to have dismissal of this complaint for insufficiency and I think we ought to have such a finding. There has been no lack of opportunity, your Honor, on the part of the plaintiffs to put anything they desired in that complaint. What are the facts of jurisdiction? You must search the papers, this complaint filed in vain for any legal facts on that question. You will not find a word as to what we are talking about in terms of any of those things that are critical to estab-

lishing the fact of jurisdiction. You have some vague opinions there by Mr. Frey, who, by his own testimony, is not an expert and therefore, they are not worth anything, so you have absolutely no showing of jurisdiction and I think on that basis, as well, we are entitled to have a summary judgment with respect to the jurisdictional claim.

I don't think there is any necessity to go further. There certainly has been opportunity to do that. The papers are before your Honor and they are because one adjournment has been requested by the plaintiffs after another and certainly there has been ample time for the plaintiffs to put in whatever they could to meet the issue of this particular motion.

The problem is we have a dispute under a contract. That is a legal problem and as long as there was an order in force by this Court requiring us to provide these people with whatever they wanted to get from us in the way of sand and gravel at the regular price less twenty-two per cent

discount, everything was fine. They were very happy with that, but of course, that order has now been taken away and we have a breach of contract suit, plain and simple that doesn't belong in this court, if I may say so, so I think, on the basis of the papers before the Court with all the opportunity that has been had, it is very clear there is no jurisdiction and there is adequate ground for the Court finding to that effect and there should be no opportunity now some five years after the commencement of the litigation for these plaintiffs to come up and give us a new complaint, heavens knows on what basis, and alleging whatever cause of action they may be able to. I think we are dealing with the complaint we have had before us, and I think that should be dismissed and if they feel they have some rights they believe have been transgressed in the interim period, they can start another suit on their part, so I do ask the relief in the moving papers be granted, your Honor.

THE COURT: Mr. Weiss.

MR. WEISS: We are somewhat in a dilemma, your Honor. We are here before your Honor under the Federal system of pleading which not only calls for, but - -

THE COURT: Mr. Weiss, have you read the case?

MR. WEISS: Yes, I have, your Honor.

THE COURT: Put the shoe on the other foot. It seems if you have a client who sued under antitrust action, you know you are going to be faced with a lot of discovery and a lot of time and effort which has gone on here for some time, but doesn't that make sense that there ought to be some facts alleged so that the defendant knows. You wouldn't start an action unless you thought you had something to begin with.

MR. WEISS: Yes, your Honor. It is their move and I am not quite sure what they are moving on, if it is clear what they are moving on. If they are moving on the face of the complaint, your Honor, I submit that the face of the original complaint needs no amplification under the Federal rules or any other rules. Mr. Fuzak is

very adequate, but he is not well-founded. It alleges a conspiracy.

THE COURT: But those aren't facts.

MR. WEISS: Your Honor, at the time this original complaint was served, this was the extent of it that we had and then to show what they did, how they acquired, they made acquisitions including the acquisition of our source of supply and the purpose was monopolizing, restraining trade in commerce of gravel and sand and concrete. I submit to your Honor this is not the complaint in the Copp case. The Copp was very limited. The original complaint here is specific enough. Your Honor, in Federal pleadings, the complaint, and even in antitrust, are required to give chapter and verse of what the defendants have done.

THE COURT: Mr. Weiss, that is my trouble. Mr. Fuzak says that I consider, that he has cited here, for example, Page 4, he has a quote, "legal conclusions alleged in the amended complaint are no stronger than the ultimate facts alleged therein. It is essentially complaint allege ultimate

facts from which it may be determined", and so on.

MR. WEISS: Well, I will read some ultimate facts to your Honor which I submit are in the original complaint. I apologize that I have not finished the amended complaint but your Honor has asked about the Copp case. I think it was known to some extent beforehand that the language of the Sherman Act and the language of the Clayton Act was different. In fact, the language of the Clayton Act differs internally between the sections, as the Supreme Court pointed out. Section 3 and 7 speak in one form of commerce and Section 2 speaks in another form.

Your Honor, the complaint, we submit, the original complaint with its allegations would stand under the Copp or any other interpretation. Now, I am not saying this is the last word. This complaint was drawn five years ago. We had no discovery. Now, it is ingenious of Mr. Fuzak to tell how much discovery we have had. We are battling every day for discovery with him. Now, we

had two sessions in December 1974. The first two times we were allowed any of their books, - we had absolutely no depositions. They have all their depositions and they say we don't cite any facts. We can't tell what the market is. We haven't had the first word of a deposition yet. We have gone out there on about six other occasions for an hour and a half or two hours on an afternoon, and it is very severely limited. They will turn down book after book after book. They have given us certain limited records, your Honor, limited by time, limited by category, limited by hours. We have another motion before the Magistrate now. We have several previously pending. We cannot be called upon to give facts of their acquisitions and of what they have done. We haven't the faintest idea. They have turned out every book. They have torn them out of their records relating to their intercompany and intracompany transactions.

Now, we can't defend commerce. For example, your Honor, we know that concrete

products are cast from our concrete and shipped across state lines. He said there is not a word about that. Well, if he read Mr. Frey's affidavit, he would see it there, but he says he can't rely on Mr. Frey, he is admittedly not an expert. I don't know who ever admitted he isn't, and yet he says we haven't submitted anything. If we submit it, we are not an expert and if we do submit it, it is not enough, but he says there is not a word of anything. That is not true. Now, in addition to that, if your Honor would consider this, the Copp case dealt with interstate highways which are funded or Federal aid funds it. This is not the case in this case. There are Federal highways in this case. The Buffalo Airport doesn't come under the Federal Highway Administration or is not funded by the Federal Highway Act. The runways of the Buffalo International Airport are actually used under Federal jurisdiction. The state, the New York State Thruway is plowed by the State of New York or the State

Thruway Authority. The landing and control of airplanes at the Buffalo International Airport and the delay of the contractors working there is directly under the Federal Aviation Administration.

Secondly, and I don't think this is anything small and is more specifically set forth in the amended complaint which I again, I say I have been, and I owe your Honor something on the White case, but I am sorry, that is coming too. I am just inundated. I just can't help it right now, but I do have something coming in the case with Mr. Heeney also on the cases he cited in his brief that your Honor asked about.

Your Honor, look at where we are. In the Copp case, the Court says the plaintiff there disowned any sales between Nevada and California even though they were very proximate to the boundary. Now, we don't claim there are sales in Canada, but I do say we have got just the equivalent of that in this case and that is this is the largest port of entry in the entire Canadian-United States border and this

Niagara Frontier is a concrete and a cement market. Despite what he says, our cement comes across that border. We import half a million dollars worth of cement a year across that border. The cement industry with its vertical integration in the cement industry, although this is a lower step down, jurisdiction was taken, as sited in our brief, by the Federal Trade Commission. People have been indicted in the ready-mix business for violation of the Sherman Act with no more showing of interstate commerce than we have here. Take this border, your Honor, there is a Peace Bridge across it. concrete is poured on that Peace Bridge in the ready-mix industry right up to the very center where one inch, not even an inch, an infinitesimal amount of the Canadian border, that is surely interstate commerce. That is not an interstate highway. That is a bridge over international waters. The papers and the affidavits by people who are admitted not expert according to him, but who have been

been barging concrete, - maybe they are not an expert in interstate commerce, but they are experts in barging concrete on international waters, the Niagara River is not in the jurisdiction of the State of New York. The Niagara River is under the jurisdiction of the United States Department of Interior and the United States Government, the joint boundary commission and if anyone doesn't believe them, let them try to sail a ship out there or build some facilities in the Niagara River.

There are many, many facts that Mr. Fuzak has just chosen to ignore to show that we are not, that whatever the test is,- I was aware of the test of affecting commerce and being in commerce. The Sherman Act represents the fullest congressional exercise of its jurisdiction which, as you know, they could get to the neighborhood barber shop if they wanted to under the commerce clause and the Sherman Act represents that.

The Clayton Act was admittedly more

specific. How specific, like many things you don't find out until they rule up there in Washington. They have rules in the Copp case, but they have also laid down very severe limitations and qualifications and said what they don't pass on and plaintiff in that case did not make or put his best foot forward and disclaim certain factors or considerations which would have rendered or made necessary a different decision. We have not done that in this case, even in the original complaint.

Now, your Honor, it tells here this action involves trade or commerce among the states, including the purchasing, receiving, storing, producing, batching, selling, distributing cement aggregate, concrete. These are ultimate facts. Now, this is not conclusions, this is a fact. If he is moving on the face of the complaint, it is here, but he is not moving on the face of the complaint. He says he is moving on the face of the complaint and then he says he is moving for summary

judgment which is not on the face of the complaint.

If he is moving for summary judgment, we haven't even had our discovery. We are entitled and in the Copp case, the Court allowed discovery before they heard the motion on commerce. I am entitled to use his commerce and to the extent to which he is engaged in commerce and to the extent which everyone else is engaged in commerce to determine what this industry is and what the market is.

Now, as far as relative market in antitrust complaints, it is not customary for plaintiffs to specify relevant complaints or in detail specify relevant markets in their complaint. Relevant markets are customarily delineated as the discovery has progressed to a point where it is determined on what relevant market the defendant or the plaintiff will stand. We have not had the discovery which would enable us to determine exactly what relevant market. I can give your Honor many alternative relevant markets, but

the relevant market for trial is something the customer will determine.

THE COURT: What discovery do you need, Mr. Weiss?

MR. WEISS: Well, we have before his Honor the Magistrate, several motions which we have just made one more motion, your Honor.

THE COURT: Is there one person in their organization that you could depose who could explain this?

MR. WEISS: There is, but they won't produce him.

THE COURT: The thi: :hat puzzles me - -

MR. FUZAK: Excuse me. I am sorry, your Honor, to interrupt, but a lot of statements are being made here that are not supported by papers and not supported by the facts. These folks have had ample opportunity to be out at our premises inspecting it. If they chose to come for an hour and a half on a few days, that is their business.

THE COURT: Of course, the other thing is, Mr. Weiss, you folks have your trucks out in the market and the defendant has theirs.

MR. WEISS: No, your Honor, I don't agree with

that. I am sorry, I don't think so.

THE COURT: They are not out selling gravel?

MR. WEISS: No, your Honor. We are not selling gravel.

MR. FUZAK: Ready-mix, your Honor.

THE COURT: Ready-mix. I mean you are out selling to customers, right?

MR. WEISS: We are both selling ready-mix, yes, your Honor, but there is no market that is exclusive to him or to us.

THE COURT: Of course not. All I am saying is your drivers, your salesmen, you are out there dealing with customers all the time.

MR. WEISS: Yes.

THE COURT: And you did for the last five years and then before that.

MR. WEISS: Yes.

THE COURT: Wouldn't you, if you are being hurt or injured, wouldn't you, - it seems to me be able to say "Look, they have this arrangement out there with so and so".

MR. WEISS: We allege this - -

THE COURT: Making kick-backs and they do this and they do that.

MR. WEISS: Yes, we have done this, your Honor.

It is all in the papers. He denies it. That doesn't mean it is not there.

THE COURT: That is the thing, is it in the papers?

MR. WEISS: Yes, your Honor. We haven't repeated everything. We have referred back. We have eleven Eastern Hills kick-backs. He denies it.

THE COURT: Wouldn't you know then who would you have to depose in their organization?

MR. WEISS: Yes. I told your Honor we do, but he won't testify.

THE COURT: All right, who is that?

MR. WEISS: Ludwig Kahle.

MR. FUZAK: Mr. Kahle, as Mr. Weiss has been advised and knows full well is not in a health position where he can testify. We have had conversation about this before and we have had it with the Magistrate downstairs. There is no necessity to have Mr. Kahle give a deposition.

THE COURT: Is there anyone else has the same information?

MR. FUZAK: Your Honor, the problem here, if I may say, - I will answer that question,

but the difficulty here is that I think there is an ongoing perversion of what an action is supposed to be all about. You are not supposed to bring an action in order to get discovery and inspection so that you can see whether you have some kind of a claim and that is what we have here.

THE COURT: I know that, Mr. Fuzak, and it has been around for a long time, but it just seems to me that by this time that we ought to be able to say, - I mean you haven't said anything in any of the papers as far as the one thing about the gravel business is practically you can only, or the ready-mix business, that you can only practically sell within a certain area.

MR. WEISS: That is true, your Honor.

THE COURT: So that in that respect, if you were down, let us say, near the Pennsylvania border, if you were down at Ceres, New York, or someplace, then I suppose you would deal in Pennsylvania and in New York State and deal with people in New York State and Pennsylvania but you folks, you

do not do that. It seems to me, Mr. Weiss, I will read the papers carefully, but it seems to me that perhaps you had an argument before Copp, but that the Copp case, it dealt with the very same kind of argument that you are making here, that the sales were made to people who were putting this business into interstate highways and it doesn't change it simply to say that it is runways or that it is a bridge, and even if you did pour some concrete on the bridge, you have no estimate about what percentage of the market that would be.

MR. WEISS: Well, your Honor, this is the point. We did not pour that concrete. They poured the concrete.

THE COURT: Even so.

MR. WEISS: We haven't been able to have discovery.

THE COURT: Would that conceivably be any large part of the bueiness of either one of these companies?

MR. WEISS: Your Honor, on this point, it is true that concrete and ready-mix concrete

and sand and gravel are sold and delivered in the Niagara Frontier area. We also consider and must consider, and as the amended complaint does - -

THE COURT: We do not have the amended complaint.

MR. WEISS: Well, your Honor, I am moving to submit it if your Honor - -

THE COURT: If you want to do that with an affidavit explaining why you have to do it, but I am not going to rule on any amended complaint until I have it here on the table and to give Mr. Fuzak an opportunity to look at it and to move against your application. I am not going to rule on that in the abstract.

MR. WEISS: Your Honor, the allegation here is before us in this case and it appears as amplified by the affidavits of the many motions and applications to this Court, is that what they are trying to do is achieve a monopoly in the ready-mix business in the Western New York area on the Niagara Frontier which will restrict interstate trade and commerce. The only test for the Sherman act, your Honor, is

affecting interstate commerce. It is not being in commerce. The test of the Clayton Act is - -

THE COURT: All right. Number one, Mr. Fuzak, in his affidavit, has listed a number of companies who are also trading in the same area as the plaintiffs and defendants in this case.

MR. WEISS: Well, your Honor, those companies to which he refe. are very small companies and they account for a very substantial minority of the business. There is a chart in our brief which shows that over the years Pine Hill has engaged upon a very consistent course of acquisition on two levels, on the concrete level and on the gravel level and most classic anti-trust case, your Honor, is acquiring your competitor's source of supply. There is no more basic violation. It is a per se violation of the Sherman Act to acquire your competitor's source of supply. It is so classic and so per se, your Honor, that the cases rarely talk about it. The cases talk about vertical integration.

That is, a manufacturer acquiring his own - -

THE COURT: You do not have any of this spelled out in the complaint, though.

MR. WEISS: We do, very definitely.

THE COURT: Who they acquired or when they acquired.

MR. WEISS: Yes, we do, your Honor.

THE COURT: Where?

MR. WEISS: Do you have the original?

THE COURT: Yes.

MR. WEISS: It is Paragraph 2. It says, "The hereinafter alleged acts were part of a wrongful, illegal and improper conspiracy of each of the defendants acting together for the purpose and objective of monopolizing and restraining trade and commerce in gravel and ready-mix business, as well as plaintiffs' competition with plaintiffs, injury to plaintiffs, their business, competitive status for the purpose of increasing sales in violation of the Sherman Act and the Clayton Act", and then it tells what happened.

THE COURT: This is history. Twenty three then talks about something that occurred in 1957.

MR. WEISS: Well, your Honor, it alleges that they continued down to date and, your Honor, it doesn't matter when the conspiracy started. The bar is only to recovery of damages. The four year antitrust bar is recovering damages and I can see that you cannot go beyond the statute of limitations for damages.

THE COURT: I can see that it may be necessary to understand the claim to take evidence as to what happened back in 1940, 1950, 1960, so that you could understand. What events do you claim occurred in the late 60's?

MR. WEISS: Well, for one thing, they continued to acquire. In 1968, they acquired a, - well, here is how that works, your Honor. We attempted to acquire our own gravel supply in Alexander, New York, and we acquired several acres of land.

THE COURT: Where is this in the complaint?

MR. WEISS: Well, your Honor, this was not in the complaint. There are things we learned about after the complaint but, your Honor, it has been my practice and the practice of other practitioners also in the antitrust

field to amend their complaint as the time to trial draws near to reflect the matters which we learned after the complaint was filed and as the result of discovery, and in this case, it is also necessary to sharpen up the complaint, I admit, because of the Copp decision, but I have yet to see a practitioner who can serve a perfect complaint the first time, especially in a complex antitrust case. Now, I litigated with many attorneys in that field and I have yet to see a case which really went to trial on the original complaint unless they are relying strictly on the notice pleading, but in 1968, Frey had a gravel area in Alexander, New York. This is the gravel area Mr. Fuzak says that we should be using and not bothering him.

THE COURT: Mr. Weiss, all I want now is you point to me in the complaint about other things where there is factual allegation. Whether or not you have a right to file an amended complaint is a different question.

MR. WEISS: All right. Here, Paragraph 28, "The aforesaid actions, refusals, admissions of the defendant were intended as part of an attempt to secure for defendants Kahle, Pine Hill and Regent, a present and continuing monopoly in the production of sand and gravel and ready-mix concrete, a present and continuing control by the defendants as competitors of plaintiffs' available gravel sources of supply. Continued present and continued restriction of plaintiffs' ability to compete with defendants in trade or commerce".

THE COURT: When you talk about aforesaid actions, you are referring to, I suppose, the items listed.

MR. WEISS: Previously listed.

THE COURT: In which you charge that they failed to perform an agreement.

MR. WEISS: Yes. That was the latest manifestation of it.

THE COURT: And then they drew a deed and they started a lawsuit.

MR. WEISS: Well, it also goes back to Paragraph 23 where it tells that they bought Prohl

Brothers in 1957. Now, I did not know at the time that this complaint was filed, your Honor, of their other acquisitions. I learned more about it later on the day we went in, the first day of discovery in December we learned further about their acquisitions. I could not have had that information. I am being hamstrung by them because I am not being accorded an adequate,- I know we are going through procedures to have discovery, but it is being drawn out slowly and I do not have what I consider to be an adequate opportunity to discover what this case is about, what their acts have been. Now, where there is a prima facie showing, as there certainly is in this complaint and by the evidence so far, that we have been harassed in our business and that they have attempted to monopolize, that they are making acquisitions, I think - -

THE COURT: If someone starts a lawsuit against you, is that harassment?

MR. WEISS: Well, we started against them.

THE COURT: Are you harassing them or are they

MR. WEISS: Well, we started it because of their harassment.

THE COURT: They can start a lawsuit against you.

MR. WEISS: No, we started this lawsuit, your Honor, but they have harassed. They have have interfered with. The most recent example, your Honor, I could not have put this in the original complaint, is that they have been maintaining a loss price on concrete below cost price according to our claim which is in the affidavits and I submit this is either on the face of the complaint or it is a motion for summary judgment. If it is a motion for summary judgment, we are entitled to have all of the information to date and all of the files considered here, but they have been maintaining a $22 price on the one hand against us and we can't even make it for that price and they can't either, and we have alleged that, not in the original complaint, but in the papers subsequent to that and that will be in the amended complaint which we will present

to your Honor for consideration. They have maintained this loss price for the purpose of driving us out of the market. They are doing this in the face of the knowledge that we are operating at a very great loss. They are subsidizing this $22 price out of other industries that they run out of the same office out there. For example, they are operating the land fill business called Lancaster Sahitary Land Fill. They are making money there and those so-called independent truckers that they were citing to your Honor, that is a related company operating right out of Pine Hill's office and they are managing it, supervising it and charging a fee for that. They are using all of this money, about half a million dollars a year and they are pouring that into Pine Hill to depress the price to $22 a yard instead of being honest businessmen and going out and making their money on land fill and putting that in the bank, making the money in trucking, putting that in the bank, they are feeding that back in as susidies

and we only discovered this on December 18th.

THE COURT: I think you will agree with me, Mr Weiss, that is a different problem.

MR. WEISS: No. I say to your Honor - -

THE COURT: You would certainly object strenuously if I would rule upon important motions like this urged by someone else if he was standing up here making oral representations.

MR. WEISS: Well, your Honor, I will say, and I cannot say more than this, the complaint, as originally drawn, will support any and all of the actions that they have engaged in, the so-called predatory acts. Now, they have not been chapter and verse. In my position, you do not need to chapter and verse predatory actions in an antitrust case. If your Honor is of a different opinion, I don't think I can convince your Honor and I don't think - -

THE COURT: The only convincing that is needed, Mr. Weiss, are some good cases. I do not think that things are decided by majority of cases on one hand and on the other, but

Mr. Fuzak has cited a number of cases in which you have the quotes here in the brief, in which the Courts have said that you have got to put down specific facts in these complaints. You have not, as I look at it, you have cited some cases, but none in opposition to this proposition.

MR. WEISS: Well, your Honor, I thought that the cases were so well established and so elementary that we have alleged here, - what we have alleged here is sufficient and what we have alleged here shows or claims, and I don't have to prove it in my complaint. I only have to allege it, alleges that they are attempting to have a monopoly of interstate trade in commerce in cement and concrete. Now, that is not in the Copp case. It is not alleged that they were trying to affect or restrain trade in asphalt in the Copp case.

THE COURT: They did not take up the Sherman Act.

MR. WEISS: Pardon me?

THE COURT: I say the Sherman Act consideration was not before them. Mr. Fuzak, is there

anything else you want to say?

MR. FUZAK: Yes, sir, just very briefly. The Sherman Act was, of course, considered in Rosemont and Leiberthal, both of which we have cited to the Court and which I think are very controlling on that issue of the matter.

As far as this discovery is concerned and as far as the approach that has been taken by the plaintiffs is concerned, as I understand the argument, it would be sufficient to have a complaint simply to say these devils, these defendants are devils, they have violated the Sherman Act and they have violated the Clayton Antitrust Act and that is enough. You don't have to give us any facts as to how we did it or why we did it or anything of that sort and I suggest to the Court again, if you will go back to the complaint and aside from all the allegations that have been made here, there is no cause of action stated and I don't think there is any necessity to go on further, except also I might say this to you, your Honor,

that delays in pursuing of discovery and inspection do not fall on our shoulders, your Honor.

MR. WEISS. Well - -

MR. FUZAK: Just a minute, please. Just a minute. We have agreed to provide them with a wide variety of documents. Some things that they have asked for we have not agreed to provide and those are under consideration by the Magistrate, but we have agreed to provide them with a wide variety of documents, a tremendous number of documents. They could be out there all day everyday if they wanted to and they still wouldn't be through investigating it. Now, if they choose to go out for an hour and a half every other day or so, that is not our fault, your Honor, and we have not delayed the process before the Magistrate. Again there have been, - and I am not criticizing Mr. Weiss, because we all have problems as counsel, but there have been repeated requests for delays on the argument of that motion and it was just finally argued not too long ago.

MR. WEISS: We have since made a further motion before the Magistrate, your Honor. They have not produced a wide variety. They have agreed to produce roughly ten or twenty per cent of the material we requested. The Magistrate requested a listing of all the things which we had provided them and which they refused to provide us. That is before the Magistrate now. Even the materials that they agreed to provide before the Magistrate they are limiting that and that is why we are going back again to the Magistrate.

MR. FUZAK: We are limiting, we have limited, your Honor, the discovery to some reasonable point in time here. We are not going to permit discovery of our books and records as to what is going on now in this business or has gone on in the very recent past because we are in competition with these folks. They are out beating our brains out everyday.

THE COURT: I will consider this submitted. Mr. Weiss, if you desire to file anything in writing directed to the cases cited here

any law, I will consider it if it is done promptly, but I think you ought to do it right away. I am not going to hold up my decision on this waiting for it, but if you want to submit it, I will consider it.

MR. WEISS: Your Honor, may I have two weeks?

THE COURT: I do not know. I do not think I will get to it in two weeks. I am not going to promise you. I might get a decision out on this tomorrow. I will leave it up to you. If you want to send it to me, I will consider it, but I am going to get the decision out on this as soon as I can. Whether it will be two weeks or two days, or three weeks, I cannot tell you.

MR. WEISS: Your Honor, I think it is manifestly unfair to expect us, after this period of time, after the delays they have given us, to come up with a comprehensive answer to what percentages he is talking about.

THE COURT: I am talking about just the law now, that is all.

MR. WEISS: I submit that the complaint was sufficient.

THE COURT: He cited certain cases here which we

have talked about and you have not answered them in your memorandum because, evidently, you have taken a completely different point of view on this.

MR. WEISS: Your Honor, I am confused if he is relying on the face of the complaint or on the papers before the Court. I think your Honor asked the same question when we started. If it is on the face of the complaint, I say there is no question. I say the face of the complaint alleges sufficient acts. If it is on all the papers before the Court - -

THE COURT: You do not want to submit anything else?

MR. WEISS: Yes, I do, your Honor. I would like submit two things. One, I would like to say if I can further answer these cases which he has and I still have the amended complaint which is almost completed and I realize there is a separate motion pending for that.

THE COURT: I will consider there is no motion pending for that because until you file papers, I have no motion before me.

There is nothing pending before me.

MR. WEISS: Your Honor, I filed the motion, but I did not file the complaint.

MR. FUZAK: Your Honor, I don't think I have even got that motion.

THE COURT: I think there is a motion here, but there is no complaint and there is no affidavit explaining why an amended complaint ought to be permitted. May 9th, motion of James Neil.

MR. FUZAK: I haven't gotten any motion.

THE COURT: This is a motion for discovery.

MR. FUZAK: I don't think.

THE COURT: All right. Very well. We will take it up.

MR. FUZAK: Thank you, your Honor.

MR. WEISS: Thank you.

* * * * * * * * * * *

I certify that the foregoing is a complete and accurate transcription of my shorthand notes taken herein.

E. F. KNISLEY, Official Reporter, USDC, WDNY.

Plaintiffs' Letter to Court Dated July 31, 1975.

7/31/75

RAICHLE, BANNING, WEISS & HALPERN

ALGER A. WILLIAMS
COUNSEL

FRANK G. RAICHLE
DERRICK C. BANNING
ARNOLD WEISS
DAVID C. DIEFENDORF
RALPH L. HALPERN
R. WILLIAM STEPHENS

852-7587
AREA CODE 716

LAW OFFICES
10 LAFAYETTE SQUARE
BUFFALO, NEW YORK 14203

July 31, 1975

Hon. John T. Curtin
United States District Judge
United States Court House
Niagara Square
Buffalo, New York 14202

Re: Frey v. Pine Hill
Civil No. 1970-277

Dear Judge Curtin:

We enclose herewith an affidavit of Lois Muck specifically relating to the interstate commerce question raised by defendants' motion to dismiss.

We have almost completed preparation of our amended and supplemental complaint, which will ask leave to serve, which more clearly delineates the jurisdiction of the Court under the Sherman and Clayton Acts, in view of the Supreme Court's recent decisions.

We are in a dilemma with regard to discovery since we have not yet had any significant discovery and defendants have moved the Court, before Magistrate Maxwell, for protective orders. We require the discovery relating to the "commerce" issues before we can have a full record before the Court with respect to defendants' motion to dismiss.

Accordingly, we have informed Magistrate Maxwell, appropos of Mr. Fuzak's last request for an adjournment, that we would not be opposed to a limited adjournment pending Your Honor's decision.

Hon. John T. Curtin July 31, 1975

However, we do desire to take defendants' testimony on the commerce issues in the interim, so that we can supplement the record before Your Honor on defendants' motion to dismiss for lack of jurisdiction.

Accordingly, by a copy of this letter to Magistrate Maxwell, and to Mr. Fuzak, we are requesting that at least as to the commerce issues, discovery proceed, and that defendants' motion for a protective order be argued and decided as soon as possible.

Very truly yours

ARNOLD WEISS

AW:T
CC w/enc.: Magistrate Edmund F. Maxwell
Victor Fuzak, Esq.

Defendants' Motion for a Protective Order Dated September 2, 1974.

11/6/74

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased

Plaintiffs

-vs-

CIVIL 1970-277

NOTICE OF MOTION

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

Defendants

Defendants move the United States Magistrate, pursuant to Order of this Court entered on October 16, 1974, and pursuant to Rule 26 of the Federal Rules of Civil Procedure, for a protective order with respect to the attached notice of production and discovery dated November 27, 1974, served on behalf of plaintiffs, as follows:

1. Vacating and deleting the following language in the said notice which purports to modify and control all

discovery sought: "of each corporation or firm which is, or has been, consolidated, affiliated, related, connected or working therewith, by contract or otherwise; and of each individual who is a principal shareholder, manager, officer, agent, representative or manager thereof; for the period 1949 to date".

2. Deleting therefrom and vacating the items described under "I. Financial Records".

3. Deleting therefrom and vacating the items described under "II. Acquisitions - Ready-Mix Companies" excepting such acquisitions as may have occurred since 1968.

4. Deleting therefrom and vacating the items described under "III. Acquisitions - Aggregate Companies" except with respect to such acquisitions since 1968 and the acquisition of Pfohl Brothers, Inc.

5. Deleting therefrom and vacating the items described under "IV. Acquisitions of Operating Companies".

6. Deleting therefrom and vacating the items described under "V. Acquisitions of Gravel and Other Lands".

7. Deleting therefrom and vacating the items described under "VI. Ready-Mix Raw Material" except with reference to items C and E from 1968 to date.

Defendants' Motion for a Protective Order Dated September 2, 1974.

8. Deleting therefrom and vacating in their entirety items described in "VII. Ready-Mix and Aggregate Sales" paragraphs K, L and M and limiting and restricting items produced pursuant to paragraphs A through J thereof to the period 1968 to date.

PLEASE TAKE NOTICE, that this motion will be brought on for argument before the United States Magistrate in his offices on December 6, 1974, at 2:30 o'clock p.m., United States Courthouse, Niagara Square, Buffalo, New York.

Dated: Buffalo, New York
December 2, 1974

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

By s/Victor T. Fuzak
Victor T. Fuzak
A Member of the Firm
Attorneys for Defendants
Office and Post Office Address
1800 One M & T Plaza
Buffalo, New York 14203
Telephone: 856-4000

TO:

RAICHLE, BANNINO, WEISS & HALPERN
Attorneys for Plaintiffs
Office and Post Office Address
10 Lafayette Square
Buffalo, New York 14203

Affidavit of R. William Stephens Dated January 13, 1975.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY AND LOIS MUCK as co-executors
of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

PINE HILL CONCRETE MIX CORP.,
REGENT SAND & GRAVEL CORP.,
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL and FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC.,
a dissolved corporation, and
PFOHL BROTHERS, INC.,

Defendants.

CIVIL NO. 1970-277

AFFIDAVIT
IN OPPOSITION
AND
FOR DEFERRAL.

STATE OF NEW YORK:
ss
COUNTY OF E R I E:

R. William Stephens, being duly sworn, deposes and says:

1. Deponent is a member of the firm of Raichle, Banning, Weiss & Halpern, attorneys for plaintiffs herein. The member of the firm who has been handling this matter is Arnold Weiss, Esq., who is out of the country, and the basis of the statements made in this affidavit are notes, memoranda and conversations with Mr. Weiss.

Affidavit of R. William Stephens Dated January 13, 1975.

2. On Friday afternoon, January 10, 1975, defendants served a motion for dismissal and summary judgment, supported by a 26 page affidavit of Mr Norman M. Moran and a 15 page affidavit of Victor T. Fuzak, Esq., together with numerous supporting exhibits.

3. Mr. Weiss is scheduled to commence a trial in the Supreme Court, Erie County, commencing Tuesday morning, January 21st, which is expected to last about two weeks. Mr. Weiss estimates that he will require an additional week thereafter to prepare plaintiffs' opposing affidavits herein.

4. Accordingly, deponent requests that the Court defer defendants' motion under FRCP Rules 6(b) and 56(f) for three weeks; and further defer the same for the reasons hereafter stated, until plaintiffs complete their discovery and serve their amended complaint on defendants, or until the final pretrial hearing before the trial presently scheduled for March 1, 1975.

5. This action was commenced in 1970, and plaintiffs were not able to commence their production and discovery of defendants' records until December 18 and 19, 1974 when they had two partial days of inspection of certain limited records of defendant Pine Hill only.

6. Magistrate Maxwell is presently considering defendants' motion for a protective order and plaintiffs' opposition thereto, and plaintiffs' discovery and production are being held in abeyance in the meantime.

7. Plaintiffs' depositions of defendants are to follow defendants' production of sufficient records to allow the depositions to proceed expeditiously.

8. By order dated October 22, 1974 Magistrate Maxwell set the trial date herein as March 1, 1975.

9. On oral argument before Magistrate Maxwell in October 1974, Mr. Fuzak stated that he intended to move to dismiss the complaint. The within motion was not served until January 10, 1975.

10. On various occasions, plaintiffs have informed the Court and defendants' counsel that plaintiffs intend to serve an amended complaint to more specifically delineate defendants'antitrust violations, and would do so immediately after plaintiffs completed, and with direct allegations supported by, plaintiffs' pretrial discovery.

11. However, the complaint herein charges defendants with violations of Sherman Acts §§ 1 and 2, and Clayton Act

§§ 1 and 4, among others, by making prohibited and monopolistic acquisitions; by monopolizing the production and sale of gravel; by monopolizing the production and sale of gravel and aggregates; by discriminating with respect to price, discounts, service, production, distance, market, etc.; controlling and acquiring plaintiffs' source of gravel supply; limiting plaintiffs' ability to compete; and conspiring and scheming to accomplish the foregoing with intent to benefit defendants and harm plaintiffs. (Complaint ¶¶ 28 and 30; See also 1, 20, 22, etc.).

12. Plaintiffs have repeatedly complained to the Court that defendants were selling ready-mixed concrete below defendants' cost as part of their monopolization attempts. For example: Plaintiffs showed the Court that during 1974 defendants were importuning plaintiffs' customers with a representation that defendants would continue for the indefinite future to sell them concrete for the August 1971 price of $22.00 per yard, despite all of the price increases admittedly sustained by defendants during the past three and one-half years.

13. Plaintiffs and all other concrete producers had to raise their prices but defendants still stuck to the 1971 price. Plaintiffs are losing money even at their present price of $23.70, but they cannot raise the price higher to even break even because defendants are selling below their cost.

14. This was finally established when plaintiffs had their first brief look into defendant Pine Hill's books on December 18 and 17, 1974.

15. It developed that Pine Hill is subsidizing its below-cost concrete prices by subsidies from its affiliated companies, and that based on plaintiffs' inspection for one month, these payments when annalized show a subsidy of about $500,000 per year, or based on defendants' 197[illegible] production of about 150,000 yards, a subsidy of over $3.00 per yard. Thus, plaintiffs have now established that defendants have engaged in the classic monopolistic and discriminatory practice of below-cost sales, disguised by a hidden subsidy from affiliated companies (See ¶ 16 of affidavit of plaintiffs' auditor, E. G. Day, sworn to December 27, 1974). Pine Hill's method of disguise is evidence of its predatory intent.

16. Plaintiffs have developed this proof after only a single brief inspection of those limited records, allowed by defendants. Deponent is confident that a full inspection will develop further evidence to support plaintiffs' charges.

17. During the December 18 and 17, 1974 inspection plaintiffs also learned that defendants are granting discounts which cut their price to even less than $22.00 per yard. For example, plaintiffs found that defendants allowed discounts

much larger than the 2% claimed, and in fact, as much as $1.50 total per yard (See December 27, 1974 affidavit of E. G. Day, ¶ 13).

18. Plaintiffs have thus developed a discriminatory price policy of defendants, which even more aggravates defendants' below-cost sales violations, and explains why plaintiffs had been unable to compete, and may be forced out of business before this case is tried.

19. Plaintiffs request the Court to bear in mind that defendants acquisition of plaintiffs' gravel source especially in the face of defendants' monopolization of the other gravel sources, is a per se violation of the Sherman Act and the Clayton Act.

20. Indeed, it is plaintiffs who should move for summary judgment based on defendants' per se violations, which are acquisitions and acts of record, and admit of no issue of fact.

21. Deponent submits that the complaint herein has been effectively amended by the many antitrust charges of which plaintiffs became apprized only after the action was commenced and which are set forth in plaintiffs' affidavit heretofore served, and in the testimony which plaintiffs gave on their depositions taken by defendants.

22. Plaintiffs will move to serve an amended complaint, if necessary, as soon as they learn from their discovery the full extent of defendants' anti-competitive policies and actions.

23. A further example of plaintiffs' difficulty in alleged detailed facts against defendants is that plaintiffs are only now learning all of the facts.

24. For example, on the discovery held December 16, 1974, Mr. Fuzak handed Mr. Weiss a barely legible copy of the contract of purchase of defendant Pfohl Brothers, Inc. by defendant Pine Hill. However, it appeared from this faint copy that Pfohl had been one of the owners of Queen City Ready-Mixed Concrete Corp. in 1957 before he sold to Pine Hill.

25. One of the conditions of Frey's contract of sale of its gravel plant to Pfohl in 1949, was that Pfohl never engage in the concrete business. Mr. Weiss investigated this development last week in the Erie County Clerk's office and learned that defendant Joseph Pfohl was an active and substantial shareholder of Queen City Ready-Mix Concrete prior to 1963 when it was acquired by Pine Hill. Mr. Weiss has also been informed that defendant Pine Hill subsequently purchased Queen City, and its customers, as part of its attempts to acquire ready-mix plants in this area.

26. In view of the fact that defendants have delayed any motions to the complaint until plaintiffs were able to just begin their discovery, and in view of defendants' resistance of plaintiffs' discovery requests, after defendants have themselves had extensive discovery of plaintiffs' confidential customer, sales, purchase, operating and financial data (See plaintiffs' report dated January 9, 1975 to Magistrate Maxwell of plaintiffs' materials discovered by defendants), it appears to deponent that there is a question of good faith on the present motion.

27. Deponent requests that under the circumstances that, pursuant to FRCP Rules 56(f) and 56(g), that defendants' motion be denied, or deferred until the final pre-trial conference, and that plaintiffs be allowed to complete their pre-trial discovery, and if necessary, move for leave to serve an amended complaint, based on all of the facts.

28. Deponent further requests, that in any event, plaintiffs' time to file opposing affidavits herein be extended until February 10, 1975.

R. William Stephens

Sworn to before me this
13th day of January, 1975.

F. TERRY SZYMCZYK
Notary Public, State of New York
Qualified in Erie County
19 75

Plaintiffs' Proposed Alternative Amendments to May 7, 1971 Order.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased,

Plaintiffs,

Civil No. 1970-277

vs.

PROPOSED ALTERNATIVE AMENDMENTS TO GRAVEL PRICE PROVISIONS OF MAY 7, 1971 ORDER.

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

Plaintiffs herewith submit to the Court, all without prejudice to their contentions in this litigation, the following alternative amendatory provisions in amendment of the provisions relating to the price of gravel contained in the first ordering paragraph of the Order of this Court dated May 7, 1971.

Plaintiffs' Proposed Alternative Amendments to May 7, 1971 Order.

FIRST ORDERING PARAGRAPH OF ORDER OF MAY 7, 1971, WITH PROPOSED DELETIONS SHOWN IN PARENTHESIS AND ADDITIONS UNDERLINED.

"ORDERED, that effective immediately, upon service of a copy of this order, and continuing during the pendency of this litigation or the further order of this Court, the defendants be and they are hereby directed to sell and supply to plaintiffs, plaintiffs' requirements of concrete grit and concrete gravel for use in and delivered to plaintiffs' concrete batching and ready-mixed plant and business, and to be delivered without extra charge into the bins of said plants, on Peppermint Road in the Town of Lancaster, Erie County, New York, and to be of the same quality, (and) upon the same (prices), terms, conditions and discounts as defendants heretofore sold and delivered to plaintiffs (during the calendar year 1967; or the current prevailing pit prices from time to time accorded the defendants Pine Hill Concrete Mix Corp. or Regent Sand & Gravel Corp., whichever price is lower; and it is further) ******* ".

PROPOSED CONCLUDING ALTERNATIVE PRICE PROVISIONS FOLLOW ON SUCCEEDING PAGES TOGETHER WITH COMMENT.

Plaintiffs' Proposed Alternative Amendments to May 7, 1971 Order.

FIRST PROPOSED ALTERNATIVE PRICE PROVISION

" ***, and at prices equal to defendants' list prices for the period commencing January 1, 1967, increased by the percentage increase in area concrete prices (for typical 3,000 pound test 5 1/2 bag mix concrete) from January 1, 1967 to January 1, 1971; and with respect to each succeeding year, by the percentage increase to January 1 of that year; and it is further"

COMMENT

A typical cubic yard of concrete contains approximately 3,400 pounds of aggregate (grit and gravel) and 5 1/2 bags of cement. The price of the gravel component should be up to approximately 40% lower than the price of the cement component.

In 1971 the cost of 5 1/2 bags of cement is approximately $5.50. The price of 1.7 tons of gravel aggregate should be approximately 40% lower or as low as $2.00 per ton net cash delivered.* This would make an aggregate cost of $3.40 per cubic yard of concrete and would enable an operator to make a fair profit.

If aggregate prices had increased in the industry by the amount that Pine Hill arbitrarily increased its aggregate prices to us (we were their largest customer) or (over $1.00 per ton on grit), the increase should be reflected in the price charged for concrete by Pine Hill to its own customers between January 1, 1967 and January 1, 1971.

---

* Approximately $2.60 per ton, less 20% less 2%, delivered.

We find, however, that examples of Pine Hill's prices quoted for concrete in 1967 and 1971 were as follows:

1967	1971	Increase	Percentage Increase
$18.05 per yard	$19.95 per yard	$1.90 per yard	10.5%

We thus see that Pine Hill increased its concrete prices by only $1.90 which would be completely represented by its gravel production cost increase, if we were to follow the price increases which it is attempting to force plaintiffs to pay. The fact is that other components of concrete have increased drastically since 1967 -- cement has increased, trucks, machinery and equipment has increased, and labor has increased very substantially.*** and they account for this $1.90 price increase.

It is, thus, apparent that Pine Hill's minor 10.5% increase (or $1.90 per cubic yard of concrete) does not allow for any increased cost of production of gravel material cost. This appears to us to be the most reliable measure of what Pine Hill's increased gravel prices should be during the pendency of this litigation -- it would be generous if they were allowed to raise their gravel prices to plaintiffs who are their major competitor, by the amount by which they have raised their concrete prices or 10.5%. This would result in the following prices for 1971:

	Concrete Grit	Gravel No. 1	Gravel No. 2
Pine Hill 1967	$ 2.20	2.40	2.20
Plus 10.5%	.23	.25	.23
Total Suggested 1971 Prices	2.43	2.65	2.43

Similarly, for subsequent years it is suggested that the best barometer of the gravel prices' increases, if any, which Pine Hill should charge to plaintiffs should be limited by the percentage increase which Pine Hill charges for its concrete which contains 1.7 tons of that very same gravel.

Plaintiffs' Proposed Alternative Amendments to May 7, 1971 Order.

SECOND PROPOSED ALTERNATIVE PRICE PROVISION

" ***, and at prices equal to defendants' list prices for the period commencing January 1, 1967, increased by the percentage increase in area construction costs (for typical concrete construction) from January 1, 1967 to January 1, 1971; and with respect to each succeeding year, by the percentage increase to January 1 of that year; and it is further"

COMMENT

A barometer of the increased costs of labor, equipment, materials, supplies and components, including concrete, in this industry may be obtained from a study of the increases in construction costs during the period concerned.

It seems obvious that there is a relationship between the cost of concrete, which is produced by people employed by the same Unions (operating engineers, teamsters) and utilize the same equipment, as is utilized in construction projects. When this is narrowed down to concrete construction, the relationship is even more precise.

A study of the construction costs of concrete construction in the Eastern District of the United States is annexed hereto. This study, which is rendered on a quarterly basis shows that for Class B concrete construction, there has been a price increase of 31.4% between January 1, 1967 and January 1, 1971.

Plaintiffs' Proposed Alternative Amendments to May 7, 1971 Order.

Application of this study to the Pine Hill 1967 prices would result in the following:

	Concrete Grit	Gravel No. 1	Grave[illegible]. 2
Pine Hill 1967 Prices	$2.20	$2.40	$2.20
Plus 31.4% increased construction costs	.69	.75	.69
Total Suggested 1971 Prices	$2.89	$3.15	$2.89

The application to these prices of the contract discounts of 20% plus 2% for cash, will furnish a reasonable delivered price, pending the outcome of this litigation, with an available barometer from changes year to year during what may be protracted litigation.

Marshall & Swift Publication Co
1617 Beverly Blvd
Los Angeles, Calif. 90026

Marshall Valuation Service

CLASS OF CONSTRUCTION

The Class of Construction is the basic subdivision in the Marshall Valuation Service, dividing all buildings into four basic cost groups by type of frames (supporting columns and beams), walls, floors and roof structures, and fireproofing.

Class "A" buildings have fireproofed structural steel frame with reinforced concrete or masonry floors and ro

Class "B" buildings have reinforced concrete frames and concrete or masonry floors and roofs.

Class "C" buildings have masonry or concrete exterior walls, and wood or steel roof structure.

Class "D" buildings have wood or steel frame and roof structures, ... generally include all buildings not specifically included in another class.

In each class, there will be variations and sub-classes, but for purposes of pricing, the major elements of the building should be considered in entering the tables. Thus, if a building which is otherwise in Class B, has a steel truss roof, the costs for the Class B building will still be representative. Interpolations may be made if the appraiser feels the building overlaps two classes, or the Segregated Cost Sections may be used to modify the cost.

CLASS OF CONSTRUCTION INDICATORS

CLASS	FRAME	FLOOR	ROOF	WALLS
A	Structural steel columns and beams fireproofed with masonry, concrete, plaster, or other incombustible material.	Concrete or concrete covered steel deck, fireproofed.	Formed concrete, precast slabs, concrete or gypsum on steel deck, fireproofed.	Non-bearing cavity or curtain walls, masonry, concrete, metal panels, stone.
B	Reinforced concrete columns and beams.	Concrete or concrete covered steel deck, fireproofed.	Formed concrete, precast slabs, concrete or gypsum on steel deck, fireproofed.	Non-bearing cavity or curtain walls, masonry, concrete, metal panels, stone.
C	Masonry or concrete load-bearing walls with or without pilasters. Masonry or concrete walls with steel, wood, or concrete frame.	Wood or steel floor joists or slab on ground.	Wood or steel joists, wood or steel deck.	Brick or concrete block masonry, tilt-up, formed concrete.
D	Wood or steel studs in bearing wall, wood or steel skeleton frame.	Wood or steel floor joists or slab on ground.	Wood or steel joists, wood or steel deck.	Almost any material except masonry or concrete. May have masonry veneer over steel or wood framing.

Plaintiffs' Proposed Alternative Amendments to May 7, 1971 Order.
1350

4/71

COMPARATIVE R

This page is revised every Jan. Green Supplement, Section 99. 1

COM

EXAMPLE: The replacement cost of an Eastern District brick apartmen July, 1952, was $100,000. The multiplier under Class C opposite July Assume that the comparative cost multiplier on Page 99.3 for Class C is 1.

EASTERN

YEAR OF FORMER COST		CLASS D Open Frame Steel or Wood	CLASS C Masonry Bearing Walls	CLASS B Reinforced Concrete Frame	CLASS A Fireproofed Steel Frame
1971	APR	1.000	1.000	1.000	1.000
	JAN	1.028	1.024	1.019	1.017
1970	OCT	1.043	1.041	1.035	1.031
	JULY	1.088	1.095	1.090	1.085
	APR	1.092	1.101	1.097	1.094
	JAN	1.109	1.120	1.116	1.109
1969	OCT	1.122	1.131	1.129	1.123
	JULY	1.133	1.151	1.158	1.152
	APR	1.145	1.160	1.170	1.163
	JAN	1.184	1.195	1.202	1.191
1968	OCT	1.211	1.217	1.219	1.210
	JULY	1.228	1.231	1.232	1.222
	APR	1.262	1.261	1.260	1.251
	JAN	1.293	1.286	1.280	1.267
1967	OCT	1.303	1.293	1.289	1.275
	JULY	1.323	1.315	1.308	1.295
	APR	1.335	1.326	1.318	1.304
	JAN	1.352	1.338	1.333	1.316
1966	OCT	1.348	1.339	1.331	1.317
	JULY	1.367	1.358	1.349	1.337
	APR	1.379	1.372	1.366	1.349
	JAN	1.394	1.383	1.375	1.362
1965	OCT	1.395	1.385	1.378	1.367
	JULY	1.417	1.403	1.394	1.383
	APR	1.423	1.411	1.403	1.392
	JAN	1.433	1.420	1.411	1.400
1964	OCT	1.434	1.420	1.412	1.401
	JULY	1.442	1.429	1.420	1.411
	APR	1.465	1.452	1.440	1.427
	JAN	1.475	1.459	1.449	1.433
1963	OCT	1.471	1.464	1.448	1.442
	JULY	1.481	1.470	1.455	1.451
	APR	1.498	1.487	1.467	1.464
	JAN	1.511	1.494	1.470	1.464
1962	OCT	1.506	1.495	1.471	1.467
	JULY	1.518	1.510	1.487	1.487
	APR	1.537	1.529	1.503	1.502
	JAN	1.552	1.536	1.509	1.509
1961	OCT	1.554	1.539	1.512	1.512
	JULY	1.554	1.541	1.508	1.516
	APR	1.555	1.548	1.529	1.529
	JAN	1.550	1.549	1.531	1.533
1960	OCT	1.546	1.545	1.531	1.530
	JULY	1.557	1.558	1.544	1.540
	APR	1.560	1.559	1.548	1.534
	JAN	1.572	1.571	1.560	1.543

EASTERN

YEAR OF FORMER COST		CLASS D Open Frame Steel or Wood	CLASS C Masonry Bearing Walls	CLASS B Reinforced Concrete Frame	CLASS A Fireproofed Steel Frame
1959	JULY	1.588	1.589	1.569	1.558
	JAN	1.620	1.621	1.601	1.580
1958	JULY	1.651	1.653	1.633	1.616
	JAN	1.655	1.654	1.642	1.619
1957	JULY	1.674	1.683	1.681	1.668
	JAN	1.693	1.701	1.704	1.682
1956	JULY	1.735	1.747	1.745	1.733
	JAN	1.777	1.794	1.777	1.770
1955	JULY	1.827	1.847	1.821	1.821
	JAN	1.864	1.877	1.858	1.848
1954	JULY	1.898	1.898	1.873	1.866
	JAN	1.932	1.926	1.895	1.888
1953	JULY	1.977	1.983	1.965	1.966
	JAN	1.950	1.959	1.978	1.976
1952	JULY	1.997	2.008	2.036	2.044
	JAN	1.983	2.000	2.037	2.033
1951	JULY	2.000	2.011	2.046	2.042
	JAN	2.062	2.083	2.124	2.120
1950	JULY	2.265	2.257	2.245	2.246
	JAN	2.372	2.359	2.359	2.368
1949	JULY	2.371	2.357	2.350	2.374
	JAN	2.248	2.250	2.264	2.270
1948	JULY	2.317	2.351	2.364	2.356
	JAN	2.427	2.473	2.465	2.463
1947	JULY	2.552	2.636	2.611	2.619
	JAN	2.792	2.809	2.833	2.839
1946	JULY	3.037	3.057	3.076	3.080
	JAN	3.382	3.386	3.505	3.538
1945	JULY	3.569	3.560	3.670	3.674
	JAN	3.751	3.739	3.848	3.794
1944	JULY	3.853	3.841	3.965	3.923
	JAN	3.935	3.909	4.021	3.993
1943	JULY	4.030	3.981	4.058	4.057
	JAN	4.168	4.074	4.199	4.204
1942	JULY	4.242	4.118	4.221	4.211
	JAN	4.323	4.243	4.254	4.281
1941	JULY	4.495	4.462	4.466	4.515
	JAN	4.645	4.579	4.567	4.566
1940	JULY	4.747	4.793	4.803	4.800
	JAN	5.313	4.821	4.788	4.829
1939	JULY	5.014	4.908	4.841	4.882
	JAN	5.039	4.948	4.846	4.882
1938	JULY	4.989	4.958	4.812	4.857
	JAN	4.999	4.948	4.812	4.892

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Plaintiffs' Proposed Alternative Amendments to May 7, 1971 Order.

THIRD PROPOSED ALTERNATIVE PRICE PROVISION

" ***, and at prices equal to the prevailing pit prices published as of January 1 of each year by gravel producers in the Western New York area (Counties of Erie, Genesee, Niagara and Cattaraugus; and it is further"

COMMENT

It is plaintiffs contention that Pine Hill acquired plaintiffs' gravel sources in 1957 knowing that they were acquiring the gravel source of their largest competitor and would have to observe certain ethical conduct and legal requirements in preserving their customers' market position under those circumstances. This they have failed to do. They have raised their gravel prices, contrary to the specific provisions of the contract.

Defendants' price increase was not such as would be indicated by increased cost of production. Rather the price increase was not linear and was designed to most severely affect plaintiffs who were defendants' largest competitors and largest customer for the concrete grit.

Plaintiffs raised their concrete grit prices by 45% but only raised their gravel prices by 4% to 5% in 1968. This resulted in a price structure heavily weighted against plaintiffs.

Plaintiffs' Proposed Alternative Amendments to May 7, 1971 Order.

We have been unable to discover any other producer of gravel or grit which has a price structure weighted in that manner.

We submit that the best test of what the price of gravel should be is what other producers are charging for it. A list of these prices has been compiled and is annexed hereto. The average price charged by all companies for the year 1971 is as follows:

	Concrete Grit	Gravel No. 1	Gravel No. 2
Average all Companies	$2.25	$2.14	$2.11
Average all Companies except Pine Hill	$2.00	$1.97	$1.98

Similarly for each succeeding year, the published list prices of all such quarries can be averaged and a price structure can be established for each year that this litigation continues.

GRAVEL LIST PRICES PER TON F.O.B. PLANT

COMPANY	CONCRETE GRIT	1971 GRAVEL NO.1	GRAVEL NO.2
PINE HILL CONCRETE-MIX CORP. Lancaster Plants	3.50	3.00	2.75
BUFFALO SLAG CO. INC. Franklinville Plant	1.75	1.75	1.75
GENERAL CRUSHED STONE COMPANY Machias Plant	1.75	1.75	1.75
DEWITT Batavia Plant	2.10	1.90	1.90
FREY SAND & GRAVEL CORP. Alexander Plant	2.15	2.05	1.95
DAN GERNATT GRAVEL PRODUCTS, INC. Gowanda Plant	2.25	2.40	2.55
AVERAGE ALL COMPANIES	2.25	2.14	2.11
AVERAGE ALL COMPANIES EXCEPT PINE HILL	2.00	1.97	1.98
PINE HILL 1967 PRICES			
Plus 10%	2.42	2.64	2.42
Plus 20%	2.64	2.88	2.64
Plus 25%	2.75	3.00	2.75
Plus 30%	2.86	3.12	2.86

Plaintiffs' Proposed Alternative Amendments to May 7, 1971 Order.

FOURTH PROPOSED ALTERNATIVE PRICE PROVISION

" ***, and at prices equal to defendants' list prices for the period commencing January 1, 1967, increased by the percentage increase in list prices published by gravel producers in the Western New York area from January 1, 1967 to January 1, 1971; and with respect to each succeeding year, by the percentage increase to January 1 of that year; and it is further"

COMMENT

The actual published pit prices by gravel producers which was the subject of the Third Alternative Provision, supra, is an accurate indication of the cost of producing gravel. Pine Hill's cost of production should not be any greater. Pine Hill happens to be located closer to plaintiffs' plant. The other area producers, being farther from plaintiffs' plant, still have no greater costs of production than Pine Hill.

Nevertheless, if we are to assume that Pine Hill's 1967 prices were fair prices -- they were accepted by both parties for a period of 10 years -- than as an alternative, we submit that the Court should consider those prices, as increased from time to time by the increases which other independent gravel producers see fit to raise their prices.

Plaintiffs' Proposed Alternative Amendments to May 7, 1971 Order.

These increased prices by area producers are set forth on the annexed chart. They show that a price increase for 1967 to 1971 of from 13% to 20%.

- - ying a 20% increase to Pine Hill's 1967 prices would result in a price structure as follows:

	Concrete Grit	Gravel No. 1	Gravel No. 2
Pine Hill 1967 Prices	$2.20	$2.40	$2.20
Plus 20% increase by other Producers	.44	.48	.44
Suggested 1971 Prices	$2.64	$2.88	$2.64

GRAVEL LIST PRICES PER TON F.O.B. PLANT

COMPANY	1967 CONCRETE GRIT	1967 GRAVEL NO.1	1967 GRAVEL NO.2	1971 CONCRETE GRIT	1971 GRAVEL NO.1	1971 GRAVEL NO.2
PINE HILL CONCRETE-MIX CORP. Lancaster Plants	2.20	2.40	2.20	3.50	3.00	2.75
BUFFALO SLAG CO. INC. Franklinville Plant	1.55	1.55	1.55	1.75	1.75	1.75
GENERAL CRUSHED STONE COMPANY Machias Plant	1.55	1.55	1.55	1.75	1.75	1.75
DEWITT Batavia Plant				2.10	1.90	1.90
FREY SAND & GRAVEL CORP. Alexander Plant	1.80	1.70	1.70	2.15	2.05	1.95
DAN GERNATT GRAVEL PRODUCTS, INC. Gowanda Plant				2.25	2.40	2.55
AVERAGE ALL COMPANIES	1.78	1.80	1.78	2.25	2.14	2.11
AVERAGE ALL COMPANIES EXCEPT PINE HILL	1.63	1.60	1.60	2.00	1.97	1.98
PINE HILL 1967 PRICES						
Plus 10%	2.42	2.64	2.42			
Plus 20%	2.64	2.88	2.64			
Plus 25%	2.75	3.00	2.75			
Plus 30%	2.86	3.12	2.86			

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Plaintiffs' Proposed Alternative Amendments to May 7, 1971 Order.

Plaintiffs' Proposed Alternative Amendments to May 7, 1971 Order.

FIFTH PROPOSED ALTERNATIVE PRICE PROVISION

" ***, and at defendants' list prices published as of January 1 of each year; and it is further"

COMMENT

Plaintiffs contend that defendants' price increases from 1967 were not by mutual agreement with it as required by the contract, and were not linear or percentage increases but rather arbitrary increases designed to most substantially affect plaintiffs. The increase of $1.00 in the price of concrete grit in 1968 contrasted with the increase of only 4% to 5% in the price of gravel speaks for itself.

Defendants are plaintiffs' sole source of concrete grit. Plaintiffs are defendants' largest customer for concrete grit. Defendants' concrete business has increased greatly since it sky-rocketed the price of concrete grit and the concrete business of plaintiffs and other producers in the area has decreased correspondingly.

What defendants have done with the price of concrete grit, they could not do even absent a supply contract with plaintiffs, their largest competitor, under the antitrust laws. Defendants, however, had ignored both the contract and the antitrust laws.

Nevertheless, if the Court is so inclined, and although the same would not be fair to plaintiffs, they would reluctantly accept defendants' list prices as of January 1 of each year, as though it were conceded that the contract was still in effect.

The only reason the contract can be considered not to be in effect is that plaintiffs refused to pay defendants the unilateral 1968 price increase which was both unkindly and not the subject of a mutual agreement as required by the agreement. This price increase amounted to $40,000.00 for the year 1968.

If plaintiffs had paid this $40,000.00 and not contested the untimeliness thereof, or the amount thereof as being unreasonable under the mutual agreement requirement, then the contract would even by defendants' contentions be in full force and effect today.

Under such circumstamces, defendants would not be entitled to charge plaintiffs more than defendants' 1971 published list prices, less 20%, less 2%, all delivered to plaintiffs' bins.

Plaintiffs would reluctantly accept this only as a means of reducing their losses during the pendency of this litigation. Based upon the test of area prices, construction price increases, etc., defendants' 1971 prices are unrealistic and represent a continuation of defendants' monopolistic intent and predatory practices designed to force plaintiffs out of the market.

Plaintiffs' Proposed Alternative Amendments to May 7, 1971 Order.

CONCLUSION

It is submitted that none of the suggested alternative proposals is prejudicial to defendants in view of the provisions of the Order that any differences in price would abide the event. Those differences in price would be payable to defendants if they prevailed in the litigation.

The real danger is that under defendants' predatory policies, plaintiffs may not live long enough to enjoy the victory.

Plaintiffs' Proposed Alternative Amendments to May 7, 1971 Order.

ORAL TESTIMONY AND PROOF

Plaintiffs are prepared to offer on May 28, 1971, or at any other time and place, fixed by the Court, proof of the statements contained herein.

Dated: Buffalo, New York
May 28, 1971.

HAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

Letter Dated March 11, 1975 to Judge Curtin From Defendants' Attorneys.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
ATTORNEYS AT LAW
1800 ONE M & T PLAZA
BUFFALO, N.Y. 14203
716-856-4000

GEORGE A. NEWBURY
COUNSEL

AMHERST-CLARENCE OFFICE
EASTERN HILLS [illegible]
4455 TRANSIT [illegible]
CLARENCE, N.Y. 14[illegible]21
716-633-6150

HOMER H. WOODS
LAURENCE R. GOODYEAR
JOHN E. DICKINSON
EDWIN O. TILTON
ARNOLD T. OLENA
DONALD C. LUBICK
GROVER R. JAMES, JR.
VICTOR T. FUZAK
GORDON A. MacLEOD
RICHARD E. HEATH
DOUGLAS W. KUHN
RALPH W. LARSON
CLARENCE OBLETZ
HUGH McM. RUSS, JR.
CHARLES J. HAHN
STEPHEN H. KELLY
GEORGE W. MYERS, JR.
JAMES A. PORTER
ROBERT H. MILTENBERGER, II
WILLIAM H. GARDNER
H. KENNETH SCHROEDER, JR.
JOHN J. COONEY
JOHN C. BARBER, JR.
ROBERT H. WALKER
ANTHONY L. DUTTON
JAMES H. WADSWORTH
STEPHEN KELLOGG
DAVID A. GARBUS
DAVID E. HALL
WILLIAM A. DE PONCEAU
RICHARD A. GOETZ
STEPHEN H. NEWMAN
DAVID E. MANCH
ROBERT B. CONKLIN
ROBERT W. KELLER

March 11, 1975

Hon. John T. Curtin
United States District Court
United States Courthouse
Buffalo, New York 14202

Dear Judge Curtin:

Re: George C. Frey Ready-Mixed Concrete, Inc., et al v. Pine Hill Concrete Mix Corp., et al Civil 1970-277

We have today received answering affidavits with respect to defendants' motion for dismissal of the complaint. Your Honor will recall that the original schedule established bu the Court would have required service of such affidavits by February 24, service of answering affidavits and exchange of memoranda of law on March 10, and oral argument of the motion to dismiss on March 17. In response to requests from Mr. Weiss, the Court granted an extension to file answering affidavits to March 10. We have proceeded on the assumption that the remaining portion of the schedule will be adjusted accordingly, with answering affidavits and exchange of memoranda of law to occur on March 31 and oral argument of the motion on April 7 or such other date as the Court may order.

We would appreciate it if Your Honor would confirm to us the schedule desired by the Court.

Respectfully yours,

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

By

Victor T. Fuzak

VTF:skw
Copies to: Victor E. Manz, Esq.
Arnold Weiss, Esq.

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Letter Dated April 9, 1975 to Judge Curtin From Defendants' Attorneys.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
ATTORNEYS AT LAW
1800 ONE M & T PLAZA
BUFFALO, N.Y. 14203
716-856-4000

GEORGE A. NEWBURY
COUNSEL

AMHERST-CLARENCE OFFICE
EASTERN HILLS MALL
4455 TRANSIT ROAD
CLARENCE, N.Y. 14221
716-633-6150

HOMER H. WOODS
LAURENCE R. GOODYEAR
JOHN E. DICKINSON
EDWIN O. TILTON
ARNOLD T. OLENA
DONALD C. LUDICK
GROVER R. JAMES, JR.
VICTOR T. FUZAK
GORDON A. MacLEOD
RICHARD E. HEATH
DOUGLAS W. KUHN
RALPH W. LARSON
CLARENCE OSLETZ
HUGH MCM. RUSS, JR.
CHARLES J. HAHN
STEPHEN H. KELLY
GEORGE W. MYERS, JR.
JAMES A. PORTER
ROBERT H. MILTENBERGER, II
WILLIAM H. GARDNER
H. KENNETH SCHROEDER, JR.
JOHN J. COONEY
JOHN C. BARBER, JR.
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JAMES H. WADSWORTH
STEPHEN KELLOGG
DAVID A. GARBUS
DAVID E. HALL
WILLIAM A. DE PONCEAU
RICHARD A. GOETZ
STEPHEN H. NEWMAN
DAVID C. MANCH
ROBERT B. CONKLIN
ROBERT W. KELLER

April 9, 1975

Hon. John T. Curtin
United States District Court
United States Courthouse
Buffalo, New York 14202

Dear Judge Curtin:

Re: George C. Frey Ready-Mixed Concrete, Inc., et al v. Pine Hill Concrete Mix Corp., et al Civil 1970-277

I am writing to confirm my understanding that Mr. Weiss has requested a further adjournment of the proceedings with respect to the defendants' motion for dismissal of the complaint. Final papers and any memorandum of law were to be filed on April 7 with oral argument on April 14. It is my understanding that the schedule now is that all papers will be filed and exchanged between counsel on April 21 and that oral argument would be had at 2:00 P.M. on April 28.

Respectfully yours,

Victor T. Fuzak

VTF:tk

Copy to: Arnold Weiss, Esq.

Letter Dated April 21, 1975 to Judge Curtin
From Defendants' Attorneys.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
ATTORNEYS AT LAW
1800 ONE M & T PLAZA
BUFFALO, N.Y. 14203
716-856-4000

GEORGE A. NEWBURY
COUNSEL

AMHERST-CLARENCE OFFICE
EASTERN HILLS MALL
4455 TRANSIT ROAD
CLARENCE, N.Y. 14221
716-633-6150

HOMER H. WOODS
LAURENCE R. GOODYEAR
JOHN C. DICKINSON
EDWIN C. TILTON
ARNOLD T. OLENA
DONALD C. LUBICK
GROVER R. JAMES, JR.
VICTOR T. FUZAK
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STEPHEN H. NEWMAN
DAVID E. MANCH
ROBERT B. CONKLIN
ROBERT W. KELLER

April 21, 1975

Hon. John T. Curtin
United States District Court
United States Courthouse
Buffalo, New York 14202

Dear Judge Curtin:

Re: George C. Frey Ready-Mixed Concrete, Inc., et al v. Pine Hill Concrete Mix Corp., et al Civil 1970-277

It is our understanding that at Mr. Weiss's request the schedule with reference to our motion to dismiss the complaint has again been adjourned, and that final papers between parties must now be filed on or before May 5, 1975 and that oral argument on the motion will be had on May 12.

Very truly yours,

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

By

Victor T. Fuzak

VTF:skw

Copies to: Hon. Edmund F. Maxwell
Arnold Weiss, Esq.
Victor E. Manz, Esq.

COPY

Defendants' Exhibit AD1.

THE BUFFALO SLAG CO., Inc.

FEDERAL CRUSHED STONE DIVISION
BITUMINOUS PRODUCTS DIVISION
BUFFALO GRAVEL CORPORATION

Defs'
EXHIBIT AD1
EVIDENCE
AD1 IDENT
GT. RPTR. 11-25-70 DATE
JACK W. HUNT C.S.R
AND ASSOCIATES

EFFECTIVE 12/26/70

1971 PRICE LIST

FRANKLINVILLE PLANT, located north of the Village of Franklinville, N.Y. is on the Olean Road. Shipments via rail or truck. Rail shipments originate on Pennsylvania Railroad. (Machias Station)

	F.O.B. CARS OR TRUCKS
Concrete Sand	$1.75 per net ton
Washed Screened Gravel: Size 1A	1.45 " " "
Size 1, 2, 3	1.75 " " "
Washed Crushed Gravel:	
Size 1A, 1, 2, Pa. 1B, Pa. 2B, Pa. 3A	2.10 " " "
Icy Pavement Sand, Crusher Sand	1.55 " " "
Subbase Mix	1.55 " " "
R/B Gravel*	1.20 " " "

DISCOUNT: All of the above prices are subject to a discount of 10¢ per ton for cash payment at the plant or approved charge accounts will be subject to a discount of 10¢ per ton when payment is made on or before the 15th of the month following date of shipment.

The States of New York and Pennsylvania and political subdivisions thereof, shall be sold at net prices with no discount.

Quotations on other sizes or combinations of sizes which are not regularly produced and information pertaining to taxes, delivery charges, and terms of sale, will be furnished upon request.

*Orders for R/B Gravel will be accepted subject to the approval of Plant Superintendent on basis of availability of material and loading equipment.

Prices are subject to change upon notice.

THE BUFFALO SLAG CO., INC.
Glenn E. Sherman
Glenn E. Sherman
Vice President - Sales

ACR:d

Defendants' Exhibit AD2.

THE GENERAL CRUSHED STONE CO.

GENERAL OFFICES — DRAKE BUILDING

EASTON, PENNA.

Dept.
EXHIBIT AD2

REPLY TO—

THE GENERAL CRUSHED STONE COMPANY

OLEAN PLANT

EVIDENCE
AD2 IDENT
AT RPTR. 11-25-74 DATE
JACK W HUNT C S R
AND ASSOCIATES

PRICE LIST EFFECTIVE MARCH 1, 1971

OLEAN PLANT, LOCATED AT MACHIAS, NEW YORK ON ROUTE 16.

SHIPMENTS BY RAIL AND TRUCK. RAIL SHIPMENTS ORIGINATE ON PENNSYLVANIA RAILROAD AND B & O RAILROAD (MACHIAS STATION)

PRICES F.O.B. CAR OR TRUCK:

SCREENED GRAVEL;	Pa.1B, 2B, 3A N.Y.S. 1, 2, 3	$1.75 PER NET TON, F.O.B. PLANT
CRUSHED GRAVEL:	Pa.1B, 2B, No. 2, 3A N.Y.S. 1, 2	$2.10 PER NET TON, F.O.B. PLANT
1A SCREENED GRAVEL		$1.25 PER NET TON, F.O.B. PLANT
CONCRETE SAND		$1.75 PER NET TON, F.O.B. PLANT
ICING SAND (ANTI SKID)		$1.55 PER NET TON, F.O.B. PLANT
BANK RUN		$1.35 PER NET TON, F.O.B. PLANT
SUB BASE, ITEM 4, ETC		$1.45 PER NET TON, F.O.B. PLANT
FILTER SAND		$2.10 PER NET TON, F.O.B. PLANT
CRUSHED SAND		$1.80 PER NET TON, F.O.B. PLANT
MORTAR SAND		$2.10 PER NET TON, F.O.B. PLANT
BITUMINOUS CONCRETE - TOP - LIMESTONE MIX		$9.25 PER NET TON, F.O.B. PLANT
BITUMINOUS CONCRETE - BASE - LIMESTONE MIX		$9.25 PER NET TON, F.O.B. PLANT
BITUMINOUS CONCRETE - TOP - GRAVEL MIX		$8.25 PER NET TON, F.O.B. PLANT
BITUMINOUS CONCRETE - BASE - GRAVEL MIX		$8.25 PER NET TON, F.O.B. PLANT
BITUMINOUS CONCRETE - CURB MIX		$10.75 PER NET TON, F.O.B. PLANT
BITUMINOUS CONCRETE - ARMOR COAT - GRAVEL MIX		$9.75 PER NET TON, F.O.B. PLANT
BITUMINOUS CONCRETE - STONE FILLED SHEET		$10.75 PER NET TON, F.O.B. PLANT
TYPE 1A (ITEM 51MF, 51F, 51ACF)		$10.25 PER NET TON, F.O.B. PLANT
STOCK IT - STOCK PILE MIX		$9.25 PER NET TON, F.O.B. PLANT

ALL GRAVEL PRICES ARE SUBJECT TO A DISCOUNT OF 10¢ PER NET TON FOR PAYMENT OF INVOICES BY THE 22ND OF THE MONTH SUCCEEDING SHIPMENT, PROVIDED ALL PAST DUE INVOICES HAVE BEEN PAID.

ALL BITUMINOUS CONCRETE PRICES ARE SUBJECT TO A DISCOUNT OF $.25 PER NET TON FOR PAYMENT OF INVOICES BY THE 22ND OF THE MONTH SUCCEEDING SHIPMENT, PROVIDED ALL PAST DUE INVOICES HAVE BEEN PAID.

ALL PRICES ARE SUBJECT TO CHANGE UPON NOTICE.

Defendants' Exhibit AD3.

Defts.
EXHIBIT AD3
AD3 EVIDENCE
AT RPTR. 11-25-74 DATE
JACK W. HUNT C.S.R.
AND ASSOCIATES

DAN German PRODUCTS, INC.
Grant

PRICE LIST - effective January 4, 1971

Item		For plant price
Loading material from batch plant (4-15 to 11-15)		.75 per ton
	11-16 to 4-15	.50 per ton
Concrete sand		2.35 ton
Mason sand		2.40 ton
Gravel # 1 or 1a sold with concrete sand		2.25 ton
Gravel # 1 or 1a without concrete sand		2.40 ton
Gravel # 2		2.55 ton
Bank Run Gravel		1.80 ton
Fill		.50 ton
fill - if sold 5 loads or more within 6 miles	(net)	1.00 yard delivered
Crushed Creek gravel		1.95 ton
Top Soil		1.50 yd net
Delivery of Top Soil within 9 miles		1.00 yd net
Item 2uf gravel		2.15 ton
Regular cement		1.95 bag
Mortar cement		1.75 bag
White medusa cement		4.20 bag
Delivery of cement by pickup ($6.00 minimum)		.45 bag
Delivery of cement with dump truck order		.10 bag
Calcium (100 lb bags)		5.00 bag net
Calcium (if more than ½ ton at a time)		3.50 bag net
Reinforcing mesh -10 gauge (5' x 150' rolls)		25.30 roll net
Reinforcing mesh - 10 gauge		5.50 per c sq ft
Reinforcing mesh - 6 gauge		41.80 roll net
Delivery charge for mesh (Note: a mixer truck can deliver up to one roll per trip)		2.50 piece net
3/8" reinforcing rod		9.50 per c ft net
1/2" reinforcing rod		13.50 per c ft net
5/8" reinforcing rod		15.75 per c ft net
3/4" reinforcing rod		21.00 per c ft net
1/2 x 8 anchor bolts		.40 each net
Aviation oil		.60 quart net
Aviation gas 80 octane	.50 per gallon under 50 gallons net	
	.45 per gallon over 50 gallons net	
	.38 per gallon for planes stored here	
100 octane	.50 per gallon net [illegible]	
	.57 per gallon net otherwise	
Regular gas		.31 gallon net
		.33 gallon net
		10.00 [illegible]
		[illegible]
		1.00 [illegible]

Defendants' Exhibit AD4.

Defts'
EXHIBIT AD4
EVIDENCE
AD4 IDENT
RPTR. 11-25-74 DATE
JACK W. HUNT C.S.R.
AND ASSOCIATES

FREY SAND & GRAVEL CORP.
5?L PAVEMENT ROAD
LANCASTER, NEW YORK 14086

MATERIALS * * PRICE LIST * * AS OF 3/1/71

FINE SAND	$ 1.25
CONCRETE SAND (GRIT)	2.15
MASON SAND	3.10
MIXED SAND & GRAVEL (SIDEWALK MIX)	2.25
GRAVEL #1 STONE	2.05
#2 STONE	1.95
#3 AND #4 STONE	1.95
#1 A AND #1 AS STONE	1.85
ROAD SAND (ABRASIVE GRIT)	1.85
#1 B STONE	2.35
TOP SOIL (WHEN AVAILABLE)	2.00
BANK RUN GRAVEL	1.20
FILL DIRT	1.15
ITEM 4 - LOADED	1.85
ITEM 4 - UNLOADED	1.50

THESE PRICES ARE F. O. B. AT PLANT AND ARE SUBJECT TO A DISCOUNT OF TEN CENTS PER TON PROVIDED PAYMENT IS RECEIVED WITHIN TEN DAYS OF INVOICE DATE. CUSTOMERS ARE BILLED EVERY FIFTEENTH AND THIRTIETH OF EACH MONTH.

THE STATE OF NEW YORK AND POLITICAL SUB-DIVISIONS THEREOF WILL BE INVOICED AT PRICES TEN CENTS LOWER THAN THE PRICES LISTED ABOVE, SUCH PRICES BEING NET. ALL PRICES ARE SUBJECT TO CHANGE ON THIRTY DAYS NOTICE IN WRITING. WE RESERVE THE RIGHT TO LIMIT QUANTITY OF SHIPMENTS ON HAND MERCHANDISE.

Defendants' Exhibi[illegible]5.

Defts'
EXHIBIT ADS
EVIDENCE
ADS IDE
A.I. RPTR. 11-22-76
JACK W. HUNT C.S.R
AND ASSOCIATES

BATAVIA WASHED SAND & GRAVEL COMPANY, INC.

PLANT
CEDAR STREET, BATAVIA, NEW YORK
PHONE: BATAVIA 1868

P.O. BOX 363
BATAVIA, NEW YORK

OFFICE
STAFFORD, NEW YORK
PHONE: BATAVIA 1787

June 10, 1967

Because of drastically increased labor rates we are forced to increase material prices effective July 1, 1967. As of this date the following prices will prevail on material from our Cedar Street Plant:

Mortar Sand	$2.10	per ton
Concrete Sand	1.70	" "
Filter Sand, when available	2.70	" "
Pea Gravel	1.45	" "
No. 1 Gravel	1.70	" "
No. 2 Gravel	1.70	" "
Run-of-bank Gravel	.85	" "

These prices are F.O.B., trucks at the plant and are subject to a discount of ten cents per ton provided payment is received within twenty-five days of invoice date and there are no invoices past due.

The State of New York and political subdivisions thereof will be invoiced at prices ten cents per ton lower than the prices listed above, such prices being net.

All prices are subject to change on thirty days notice in writing. The right is reserved to [illegible] adjustments of specific sales to conform with [illegible].

BATAVIA WASHED SAND & GRAVEL CO. INC.

[signature]

Defendants' Exhibit AD6.

BATAVIA WASHED SAND & GRAVEL COMPANY, INC.

PLANT:
CEDAR STREET, BATAVIA, N. Y. 14020
PHONE: 343-1668

P. O. BOX 303
BATAVIA, NEW YORK 14020

OFFICE:
STAFFORD, N. Y. 14143
PHONE: 343-1787

Defts'
EXHIBIT AD6

~~EVIDENCE~~
AD6 IDENT
A.T. RPTR. 11-25-74 DATE
JACK W. HUNT C.S.R.
AND ASSOCIATES

April 15, 1970.

To Our Customers:

Because of drastically increased labor and material costs, we are forced to increase our prices effective June 1, 1970. As of this date the following prices will prevail on material from our Cedar Street plant:

Mortar Sand	$2.50 per ton
Concrete Sand	2.10 " "
Pea Gravel	1 90 " "
No. 1 Gravel	1.90 " "
No. 2 Gravel	1.90 " "
Sand and Gravel Sidewalk Mix	2.10 " "
Run-of-Bank Gravel	1.00 " "

These prices are F.O.B., trucks at the plant.

Billing is made on the first of each month. A service charge of 1% per month will be added to accounts unpaid by the thirtieth of the month of billing. The annual percentage rate most closely approximately this service charge is 12%.

All prices are subject to change upon thirty days written notice. The right is reserved to limit shipment of specific sizes in accordance with schedules previously made.

Your past business is very much appreciated and we shall look forward to being of continued service to you.

Very truly yours,

James L. Holden

James L. Holden
Vice President

1371

Defendants' Exhibit AD7.

EXHIBIT AD7

EVIDENCE
AD7 IDENT
A.T. RPTR. 4-25-71 DATE
JACK W. HUNT C.S.R.
AND ASSOCIATES

Elmira Transit Mix. Inc.

TRANSIT MIXED CONCRETE - DUMP TRUCK HAULING - WASHED SAND AND CRUSHED GRAVEL

PHONE ELMIRA RE 8-3829

EAST FRANKLIN STREET
HORSEHEADS, NEW YORK 14845

ELMIRA TRANSIT MIX, INC.

OLEAN PLANT

PRICE LIST EFFECTIVE FEBRUARY 1, 1969

OLEAN PLANT, LOCATED AT MACHIAS, NEW YORK ON ROUTE 16.

SHIPMENTS BY RAIL AND TRUCK. RAIL SHIPMENTS ORIGINATE ON PENNSYLVANIA RAILROAD AND B & O RAILROAD (MACHIAS STATION)

PRICES F.O.B. CAR OR TRUCK: — We Order

SCREENED GRAVEL:	Pa.1B, 2B, 3A N.Y.S. 1, 2, 3	$1.55 PER NET TON −10
CRUSHED GRAVEL:	Pa.1B, 2B, No.2, 3A N.Y.S. 1, 2	$1.90 PER NET TON
#1A SCREENED GRAVEL		$1.25 PER NET TON
CONCRETE SAND		$1.55 PER NET TON −10 1.75
ICING SAND (ANTI SKID)		$1.35 PER NET TON
BANK RUN		$1.10 PER NET TON
SUB BASE, ITEM 4, ETC		$1.35 PER NET TON
FILTER SAND		$2.10 PER NET TON
CRUSHED SAND		$1.70 PER NET TON
MORTAR SAND		$2.10 PER NET TON

ALL PRICES ARE SUBJECT TO 10¢ PER NET TON DISCOUNT FOR PAYMENT OF INVOICE BY THE 10TH OF THE MONTH SUCCEEDING SHIPMENT, PROVIDED ALL PAST DUE INVOICES HAVE BEEN PAID.

PRICES ARE SUBJECT TO CHANGE WITHOUT NOTICE

Defendants' Exhibit AD8.

PRICE LIST

EFFECTIVE 4/15/70

DEWITT

Batavia, N. Y.

Concrete Sand - - - - - - - - - - - - - -	$2.10 PER NET TON, F.O.B. PLANT
Washed Screened Gravel #1 - - - - - - - -	1.90 PER NET TON, F.O.B. PLANT
Washed Screened Gravel #2 - - - - - - - -	1.90 PER NET TON, F.O.B. PLANT

Defts
EXHIBIT AD8
AD8 EVIDENCE
AT IDENT
RPTR. 11-25-74 DATE
JACK W. HUNT C.S.R
AND ASSOCIATES

This Price List is still in effect 5/17/71